Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

WHEELING & LAKE ERIE RAILWAY COMPANY,
Petitioner,

v.

CRIS A. BONACORSI,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ohio Supreme Court can create novel evidentiary requirements that are contrary to its prior precedent to defeat the defense of federal pre-emption under the Federal Railroad Safety Act of 1970 and 23 C.F.R. § 646.214, when federal courts in the state and elsewhere have found pre-emption on similar evidence?

2. Whether the Ohio Supreme Court erred in holding, in conflict with the federal statute and regulations, with this Court's precedents, and with the United States Court of Appeals for the Tenth Circuit, that the trigger for pre-emption is the disbursement of federal funds, rather than the participation of federal funds in the installation of warning devices at railway-highway crossings?

PARTIES TO THE PROCEEDING

The only parties to the proceeding are the Petitioner and Respondent listed in the caption.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that it is a wholly owned subsidiary of the Wheeling Corporation. Petitioner further states that no publicly traded company owns ten percent or more of the stock of the Wheeling Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wheeling & Lake Erie Railway Company ("W&LE") respectfully petitions for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court was entered on May 22, 2002, Pet. App. 1a-16a, and is published at 767 N.E.2d 707 (Ohio 2002). The order denying the motion for reconsideration was entered on July 3, 2002, and is reported at 770 N.E.2d 1050 (Ohio 2002). Pet. App. 38a. The order of the Court of Appeals for the Fifth Appellate District reversing the trial court judgment for Respondent was entered on November 6, 2000, and is not reported. Pet. App. 17a-26a. It is available at 2000 Ohio App. LEXIS 5173 (Ohio Ct. App. Nov. 6, 2000).

JURISDICTION

The opinion and final judgment of the Ohio Supreme Court were entered on May 22, 2002. The Ohio Supreme Court denied W&LE's petition for rehearing on July 3, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).[1]

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutes at issue in this case are 23 U.S.C. §§ 109(e) and 130 and 49 U.S.C. § 20106 (formerly 45 U.S.C. § 434) and are reprinted in Pet. App. 39a-44a. The regulations at

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[1] The judgment on liability and damages is final. The district court has stayed execution of the judgment and deferred determinations of interest owing on the judgment pending disposition of this petition by this Court. Pet. App. 34a-37a.

issue in this case are 23 C.F.R. §§ 646.214 and 646.216; they are reprinted in Pet. App. 45a-53a.[2]

STATEMENT OF THE CASE

In *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), this Court elucidated the standards for federal pre-emption of state tort law claims alleging that a railroad failed to install adequate warning devices at railway-highway crossings. This Court held that pre-emption is mandated by the Federal Railroad Safety Act of 1970 ("FRSA") for any project where federal-aid funds participate in the installation of warning devices. *Easterwood*, 507 U.S. at 670; *Shanklin*, 529 U.S. at 352-54; see also 23 C.F.R. § 646.214(b)(3) & (4).

This case presents two issues that are critical to judicial enforcement of FRSA pre-emption under *Easterwood* and *Shanklin*. First, the Ohio Supreme Court sought to avoid the result mandated in *Easterwood* and *Shanklin* by applying a heightened evidentiary standard for pre-emption claims that is contrary to settled evidentiary principles of general application in Ohio state courts. In fact, in the two years since this Court's ruling in *Shanklin*, this is the third state supreme court to impose strict and unwarranted evidentiary requirements to preclude a defense of federal pre-emption under the FRSA and 23 C.F.R. § 646.214. Additionally, for the second time, a state supreme court has declared inadequate the very same kind of evidence that federal courts in its jurisdiction have accepted as establishing a pre-emption defense, thus inviting forum shopping and destroying the uniformity that was one of the purposes of the FRSA.

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[2] The regulations are reproduced from the 2001 edition of the Code of Federal Regulations. The regulations have not changed substantively since the time of the accident.

Second, the Ohio Supreme Court misconstrued the legal standard for pre-emption, and its holding conflicts with the plain meaning of the federal regulation, this Court's decision in *Shanklin*, and decisions of the United States Court of Appeals for the Tenth Circuit. The pre-emptive regulation is applicable to "any project where Federal-aid funds participate in the installation of the [warning] devices" at a crossing, 23 C.F.R. § 646.214(b)(3). Accordingly, this Court (and the Tenth Circuit) have held that pre-emption occurs "[w]hen the FHWA [Federal Highway Administration] approves a crossing improvement project and the State installs the warning devices using federal funds" (*i.e.*, when the State commences work that is reimbursable with federal funds under federal regulations). *Shanklin*, 529 U.S. at 357; *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996). The Ohio Supreme Court disregarded this test and relied on a pre-*Shanklin* Ohio case to require evidence of actual disbursement of federal funds, Pet. App. 10a, creating the bizarre and unworkable rule that pre-emption of state tort law governing the *selection* of warning devices depends on proof of events occurring *after* the installation has already occurred. The Ohio Supreme Court's decision creates an untenable conflict with federal courts of appeals and places an impermissible burden on the assertion of a federal defense. Given the national importance of uniform rail safety rules, this Court should grant certiorari to address the conflict of authority and the risk of unseemly forum shopping that result from the Ohio court's disregard for this Court's precedent.

A. Statutory And Regulatory Background

The safety of public railway-highway grade crossings has long been a matter of federal concern.[3] From the inception of

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[3] A "public grade crossing" is an intersection of a railway and a public road at the same level. Federal R.R. & Highway Admins., U.S. Dep't of

the federal-aid highway program, Act of July 11, 1916, ch. 241, 39 Stat. 355, Congress authorized federal funds for States to use in protecting those crossings. Indeed, from as early as 1936, see Act of June 16, 1936, ch. 582, § 8, 49 Stat. 1519, 1521, Congress has forbidden expenditure of federal funds on any portion of federal-aid or other designated highways "unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing." 23 U.S.C. § 109(e). The allocation of funds for such projects reflects the FHWA's determination that they are generally of no ascertainable net benefit to the railroad. 23 C.F.R. § 646.210.[4]

In 1970, Congress, troubled by the inadequacy of haphazard state regulation of railroad safety,[5] enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[6] The purpose of the

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Transp., *Railroad-Highway Safety Part II: Recommendations for Solving the Problem* 2 (1972) ("*1972 Crossings Report*").

[4] The regulation is based on the concept that the advent of the motor vehicle is primarily responsible for the grade crossing accident problem: "The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 422-23 (1935) (footnote omitted) (discussing grade crossings); *see also Prevention of Rail-Highway Grade-Crossing Accidents Involving Ry. Trains & Motor Vehicles*, 322 I.C.C. 1, 82 (1964) ("In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train which creates the hazard and must be primarily responsible for its removal.").

[5] *See* H.R. Rep. No. 91-1194, at 11 (1970) (expressing disbelief that "safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems"), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

[6] The FRSA was originally codified at 45 U.S.C. §§ 421 to 447. As part of a broad reorganization of federal transportation laws, Congress formally repealed the FRSA in 1994 and re-enacted its substantive

FRSA was "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Congress vested the Secretary of Transportation with broad powers to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a); *Shanklin*, 529 U.S. at 347. In the FRSA's pre-emption provision, Congress unequivocally declared its intent that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. Accordingly, it only permitted States to "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.*; *Shanklin*, 529 U.S. at 347-48.

In 1972, the Secretary of Transportation submitted a statutorily-mandated study of the grade crossing problem.[7] He reported that "the current division of responsibility and authority among the private and public interests involved at the State and local level result[ed] in a fragmented approach to grade crossing safety," and he called for new "national coordination of [the] issue." *1972 Crossings Report* at 34. The Secretary recommended that Congress focus its funding efforts on installing protective devices rather than eliminating grade crossings altogether. *Id.* at 91. Although active

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provisions for codification in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. Congress made clear that the repeal and re-enactment were not intended to make any substantive change in the FRSA provisions, other than minor alterations in form or language. *See id.* § 6(a), 108 Stat. at 1378; H.R. Rep. No. 103-180, at 1-5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 818-22.

[7] Section 433 of FRSA, in addition to requiring the Secretary to undertake solutions to the grade crossing problem pursuant to his authority under existing law, mandated that the Secretary submit to the President for transmittal to Congress a comprehensive study of the problem of eliminating and protecting grade crossings, together with recommendations for appropriate action. 45 U.S.C. § 433 (repealed 1994).

warning systems were not warranted at most crossings,[8] the Secretary underscored the universal importance of passive warnings by recommending that "each railroad and each public agency which does not now have a program for passive device improvement should undertake one immediately." *Id.* at 92. Observing that crossing dangers were not limited to the traditional federal-aid highway system, the Secretary called for expansion of federal funding to all public roads. *Id.* at iii, 14, 92. Finally, the Secretary recommended that the FHWA administer assistance at the federal level, but that the "State highway departments, in cooperation with political subdivisions," have primary responsibility for developing programs for crossing safety. *Id.* at 92.

In response to the Secretary's report, Congress enacted section 203 of the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, 283.[9] This statute specifically grants federal funds to States "for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a). To secure funds, States must "conduct and systematically maintain a survey of all highways" to identify crossings in need of safety improvements, and must "establish and implement a schedule of projects for this purpose." *Id.* § 130(d). The regulatory scheme is known as the Section 130 Crossing Program.

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[8] "Active warning devices" include automatic gates and flashing lights that are activated by the approach of a train. "Passive warning devices" are devices such as signs and pavement markings that do not change when a train approaches. 23 C.F.R. § 646.204. The costs of active devices at each crossing were reported to range (in 1972 dollars) from $17,000 to $30,000 for installation, and $800 to $1,400 for annual maintenance. *1972 Crossings Report* at 77.

[9] Congress repealed section 203 of the 1973 Highway Safety Act and re-enacted its provisions (with minor substantive changes not relevant here) as amendments to 23 U.S.C. § 130 in section 121 of the Surface Transportation Act of 1987, Pub. L. No. 100-17, § 121, 101 Stat. 132, 159-60.

This federal approach to crossing safety has been a resounding success. While both highway and rail traffic have increased, the Section 130 program has contributed to a precipitous decline in the number of crossing accidents and fatalities: from 12,000 accidents and 1,500 fatalities at railway crossings in 1972 to 3,502 accidents and 425 fatalities in 2000. U.S. Dep't of Transp., *Accidents That Shouldn't Happen: A Report of the Grade Crossing Safety Task Force to Secretary Federico Pena* 2 (1996); Federal R.R. Admin., U.S. Dep't of Transp., *Railroad Safety Statistics Annual Report 2000*, at 4 tbl.1-1 (2001).

The Section 130 program was implemented through regulations promulgated by the FHWA.[10] These regulations govern state programs for evaluating railway crossing hazards and developing remedial projects. See 23 C.F.R. pt. 924. The FHWA also made States "subject to further regulations governing the use of particular warning devices." *Easterwood*, 507 U.S. at 666. Among those specific regulations is a rule prescribing what will constitute "[a]dequate warning devices" where "[f]ederal-aid funds participate in the installation of the devices" at rail-highway crossings. 23 C.F.R. § 646.214(b)(3). Specifically, 23 C.F.R. § 646.214(b)(3) lists the attributes present at the crossing that require the installation of automatic gates and flashers. For those crossings that do not have the characteristics listed in (b)(3), the type of warning device to be installed is "subject to the approval of FHWA." *Id.* § 646.214(b)(4). These regulations are at the heart of this case.

B. This Court's Decisions In *CSX Transportation, Inc.* v. *Easterwood* And *Norfolk Southern Railway* v. *Shanklin*

In *CSX Transportation, Inc.* v. *Easterwood*, this Court held that the federal regulations defining "[a]dequate warning

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[10] The Secretary delegated his statutory power to administer the Acts to the FHWA. *See* 49 C.F.R. § 1.48(b), (c)(2).

devices" in 23 C.F.R. § 646.214(b)(3) and (4) "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." 507 U.S. at 670.

This Court accordingly formulated a bright-line test for federal pre-emption:

> In short, *for projects in which federal funds participate in the installation of warning devices*, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The . . . regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

Id. at 671 (emphasis added). Simply stated, "when [§ 646.214(b)(3) and (4)] are applicable, state tort law is pre-empted." *Id.* at 670. The *Easterwood* Court found no pre-emption in that case because the regulations did not apply. No federal funds had "participated" in the installation of warning devices since the plan for upgrading a crossing was "shelved and the funds allocated for use in another project." *Id.* at 672.

In *Shanklin*, this Court reaffirmed the *Easterwood* rule, and held that pre-emption occurs whenever the federal warning-device regulation is applicable, even where passive devices (such as crossbucks) are installed without any specific determination by the FHWA or the State that the devices were "adequate" for that particular crossing under the applicable regulatory standard. 529 U.S. at 355-57.

> When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject. At that point, the regulation dictates "the devices to be

> installed and the means by which railroads are to participate in their selection." *Easterwood*, *supra*, at 671. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to [federal] standard[s] . . . that pre-empts state tort actions.

Id. at 357.

C. Statement Of Facts

This case arises out of a July 1996 collision between a motorcycle and a W&LE freight train. W&LE is a small rail company operating principally in Pennsylvania and Ohio. The accident occurred when Respondent failed to stop his motorcycle before a railroad crossing at Howe Road, in Brimfield Township, Ohio. Still moving at about thirty miles per hour at the point of collision, Respondent struck the side of a slow-moving locomotive that was traveling at 26 miles per hour as it was exiting the crossing. Respondent sustained injuries resulting in, among other things, amputation of his leg. The crossing was marked by a crossbuck sign, a passive warning device that was installed on October 12, 1995, as part of the Ohio Buckeye Crossbuck Program.

Respondent sued the railroad, alleging that the railroad was negligent for, among other things, failing to install active warning devices at the crossing. W&LE moved for partial summary judgment on the ground that the warning device claim was pre-empted by federal law. It supported its claim with an affidavit by Bruce Brown, a Roadmaster for W&LE, stating that prior to the accident, the crossbuck sign at the Howe Road crossing was installed with federal funds as part of Ohio's "Buckeye Crossbuck Program," a federally funded grade crossing program. He attached to his affidavit an agreement between the Ohio Department of Transportation and W&LE, in which W&LE agreed to replace its crossbuck signs with new signs as part of the Buckeye Crossbuck Program. The agreement provided that the reimbursement

money would come from federal funds. The court denied the motion, finding that W&LE had failed to prove that the crossbuck was installed pursuant to a federally funded plan. Pet App. 32a. The court did, however, grant leave to W&LE to file an additional motion for partial summary judgment.

In its new motion for summary judgment on the warning device claim, W&LE attached an affidavit by Susan Kirkland, Manager of Grade Crossing Safety Programs of the Ohio Rail Development Commission. Kirkland testified that she had personal knowledge (1) that the Buckeye Crossbuck Program received 100% federal funding; (2) that ODOT executed an agreement with the FHWA, and Kirkland was involved in the planning process with the FHWA; (3) that ODOT had a contract with W&LE to implement the Buckeye Crossbuck Program at its crossings, which Kirkland helped draft; (4) that Kirkland reviewed the crossbucks plans, set up the funds, and processed the bills for grade crossing projects; and (5) that Kirkland was aware of W&LE's execution of its agreement to install the devices. Kirkland Aff. at 1; Kirkland Dep. at 34, 30, 26, 33, 12-13; Ex. 1 to Kirkland Aff. at 9. Respondent did not raise an issue of fact with regard to any of these activities but argued that federal funding alone was insufficient to establish pre-emption, and that Kirkland lacked personal knowledge of the payment of federal funds. The court (ruling before this Court's *Shanklin* decision) agreed with Respondent that federal funding alone did not trigger pre-emption, and held that pre-emption would occur only if the FHWA had actually determined that the devices were adequate at that particular crossing. Pet. App. 30a; see also *id.* at 27a. The trial court did not expressly discuss the sufficiency of Kirkland's testimony, but it had denied Respondent's motion to strike her affidavit for lack of personal knowledge.

The case proceeded to a jury trial. A divided jury found that Respondent and W&LE were equally negligent in causing the accident and returned a verdict for Respondent. It awarded $1,664,200 in compensatory damages to

Respondent, but the trial court reduced the verdict to $832,100 to account for Respondent's contributory negligence.

On appeal, a unanimous Court of Appeals of Ohio, Fifth Appellate District, reversed the judgment of the trial court. Finding that Kirkland's affidavit and deposition on personal knowledge established federal funding for the Howe Road signs, it held that under this Court's decision in *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000), federal law pre-empted the state law negligence claim in this case relating to inadequate warning devices at railway crossings. The court of appeals also determined, based on a jury response to an interrogatory, that the jury's verdict against W&LE was based solely on the inadequate warning device claim. It therefore vacated Respondent's award and entered judgment in favor of W&LE. Pet. App. 26a. Respondent appealed to the Ohio Supreme Court.

D. Decision Of The Ohio Supreme Court

The Ohio Supreme Court reversed the judgment of the court of appeals on May 22, 2002, in a 4-3 decision and reinstated the judgment of the trial court on the verdict of the jury. It held that "W&LE failed to prove that federal funds *paid* for the installation of the Howe Road crossbuck sign," Pet. App. 11a (emphasis added). The court relied on its own pre-*Shanklin* decision in *Carpenter* v. *Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994), which required that "federal funds must actually have been *committed and spent*" in order for pre-emption to occur. *Id.* at 263, 631 N.E.2d at 610, *quoted in* Pet. App. 10a (emphasis added). Despite Kirkland's uncontradicted testimony that she had personal knowledge of federal funding of the crossbucks installation, the Ohio Supreme Court decided that she lacked personal knowledge of federal funding because she did not work for ODOT, the agency "responsible for handling federal funds." Pet. App. 10a. In fact, as the dissent pointed out, *id.* at 14a (Kline, J., dissenting), the record showed that Kirkland

was a manager of the crossing safety programs at the Ohio Rail Development Commission, which is an independent agency within the Ohio Department of Transportation ("ODOT").[11] Kirkland Dep. at 6. The Ohio Supreme Court further pointed out that "W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project or to show that there was an agreement executed by the federal government indicating that it would pay for the project," even though it acknowledged that Kirkland testified to the existence of such a contract. Pet. App. 11a n.10. The dissent pointed out that the majority's decision was contrary to Ohio precedent on the personal knowledge requirement as well as to the evidence of record. *Id.* at 15a (Kline, J., dissenting).

W&LE filed a timely motion for reconsideration on the ground that the Ohio Supreme Court's pre-emption analysis conflicted with this Court's decision in *Shanklin*. On July 3, 2002, the Ohio Supreme Court denied the petition without comment.

REASONS FOR GRANTING THE PETITION

I. STATE COURT IMPOSITION OF SPECIAL EVIDENTIARY REQUIREMENTS TO ESTABLISH THE FEDERAL DEFENSE OF *SHANKLIN* PRE-EMPTION IS A MATTER OF NATIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW.

In the two years since this Court's decision in *Shanklin*, state courts have developed strict and unwarranted evidentiary requirements under state law that frustrate the assertion of valid federal pre-emption defenses under the FRSA, rejecting evidence that federal courts (even in the

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[11] *See* Ohio Rev. Code § 4981.02(A).

same state) have found sufficient. This Court has frequently intervened to prevent local rules of practice from defeating the valid assertion of a federal right. Such intervention is particularly critical here given the FRSA's mandate of national uniformity in railroad safety laws.

In rejecting W&LE's federal pre-emption defense, the Ohio Supreme Court dismissed uncontradicted testimony, supported by documentation, establishing that federal funds were used to install a warning device at the Howe Road crossing. Specifically, the Ohio court allowed a state negligence claim despite an uncontradicted affidavit from the Manager of Grade Crossing Safety Programs in Ohio that the crossing in question was part of a federally funded "Buckeye Crossbuck Program," which she helped to implement. There was no evidence controverting her assertions, and indeed, there was no dispute that the crossing was part of the Buckeye Crossbuck Program, which received 100% federal funding.

The Ohio Supreme Court nevertheless decided that the affiant had not demonstrated "personal knowledge" of the payment of federal funds, which it conflated with "participation" of federal funds in the installation of warning devices. In allowing the negligence claim in the face of this evidence of pre-emption, the Ohio court ignored without comment its own rule that an affiant's and a deponent's uncontroverted assertion of personal knowledge satisfies the evidentiary requirements for summary judgment. See *State ex rel. Corrigan* v. *Seminatore*, 66 Ohio St. 2d 459, 467, 423 N.E.2d 105, 111 (1981). In order to challenge an assertion of personal knowledge under Ohio law, there has to be evidence that the affiant did not in fact know the matters asserted. *Id.* In this case, the plaintiff would have had to present evidence that Kirkland did not know the crossing was federally funded. Plaintiff did not present such evidence, and indeed the deposition established Kirkland's personal knowledge of federal funding. The plaintiff instead asserted that Kirkland did not personally handle the federal funds.

In addition, as the dissent pointed out, Pet. App. 15a (Kline, J., dissenting), under prior Ohio law, Kirkland's job duties alone (as Manager of Grade Crossing Safety Programs) would constitute personal knowledge even if she had not helped to draft the agreement between ODOT and W&LE. See *Dublin City Sch. Dist. Bd. of Educ.* v. *Franklin County Bd. of Revision*, 80 Ohio St. 3d 450, 453, 687 N.E.2d 422, 424 (1997) (per curiam) (finding a witness's job duties to support an inference of personal knowledge about the strategy of purchase price allocation, even though he did not directly negotiate the sale); *Akron-Canton Waste Oil, Inc.* v. *Safety-Kleen Oil Servs., Inc.*, 81 Ohio App. 3d 591, 597, 611 N.E.2d 955, 959-60 (1992) (finding a secretary's job duties sufficient to establish her personal knowledge about the intention of her corporate employer). The evidence in this case, as a matter of law, more than sufficed to establish federal pre-emption. Therefore, under *Shanklin*, state tort law was pre-empted. *Shanklin*, 529 U.S. at 359.

The Ohio Supreme Court's special evidentiary requirement for federal pre-emption vitiates the rule established by this Court in *Easterwood* and *Shanklin* and thus undermines the FRSA policy of uniform railroad safety rules. To accomplish the FRSA's goal of uniformity in rail safety laws, Congress decided that States could only "adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. When pre-emption is not enforced, then state law will govern subjects that the Secretary has already covered in the regulations, in direct contradiction with the terms of the statute. To ignore the law of pre-emption is to promote competing state regulation of railroad safety and undermine the efficacy of the scheme that Congress and the FHWA have established.

There is in fact a troubling national pattern emerging as state courts impose unwarranted evidentiary requirements to

defeat *Shanklin* pre-emption. In *Kansas City Southern Railway* v. *Johnson*, 798 So. 2d 374, 379 (Miss.), *cert. denied*, 122 S. Ct. 43 (2001), the Mississippi Supreme Court denied pre-emption because federal funding was proven only by an affidavit of a state highway official and not by documentary evidence, even though the Fifth Circuit had previously upheld pre-emption based on the testimony of the same official, see *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), and even though the Mississippi Supreme Court had upheld summary judgment based on uncontradicted affidavits in other cases arising under state law, see, *e.g.*, *Magee* v. *Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 186-87 (Miss. 1989). In *Duncan* v. *Kansas City Southern Railway*, 773 So. 2d 673, 680 (La. 2000), *cert. denied*, 532 U.S. 992 (2001), the Louisiana Supreme Court denied pre-emption because of the lack of "unequivocal" evidence that a device was installed with federal funds.

The Ohio Supreme Court's decision, like those of the Mississippi and Louisiana courts, is at odds with numerous federal courts that have concluded that similar affidavits, accompanied by similar documentation, are sufficient to establish that federal funds were used to install warning devices at relevant rail-highway crossings. See, *e.g.*, *O'Bannon* v. *Union Pac. R.R.*, 169 F.3d 1088, 1090 (8th Cir. 1999); *Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903 (8th Cir. 1998); *Hester*, 61 F.3d at 386; *Cochran* v. *CSX Transp., Inc.*, 112 F. Supp. 2d 733, 737-38 (N.D. Ind. 2000); *Powers* v. *CSX Transp., Inc.*, 97 F. Supp. 2d 1297, 1299 (S.D. Ala. 2000); *Williams* v. *CSX Transp., Inc.*, 925 F. Supp. 447, 451 (S.D. Miss. 1996), *aff'd without opinion*, 139 F.3d 899 (5th Cir. 1998); *McDaniel* v. *Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995).

Even more significantly, the Ohio court's ruling promotes forum shopping because the federal courts in Ohio recognize the federal pre-emption defense on the basis of evidence similar to that presented in this case. In fact, a federal court

in Ohio found that an affidavit by the very same witness, Susan Kirkland, stating that she had personal knowledge of federal funding of the very same Buckeye Crossbuck Program, was sufficient to establish pre-emption. See *Flood* v. *CSX Transp., Inc.*, No. C-2-99-1186, slip op. at 7 (S.D. Ohio July 12, 2001) (finding pre-emption based on the "uncontroverted affidavit of Susan J. Kirkland," who stated that the crossbucks were installed with federal funds as part of the Buckeye program); Pet. App. 60a. These conflicting federal and state decisions subject railroads to varying duties even within the same state and apply pre-emption unevenly along the same rail corridors. Although the FRSA mandates national uniformity, 49 U.S.C. § 20106, there is now intolerable chaos among the courts with respect to the rules for establishing pre-emption.

This Court has never hesitated to intercede when unreasonably strict rules of local practice "defeat[] a plain assertion of a federal right," even if that rule would be applicable to rights asserted under state law. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (rejecting a state court rule that an appearance waived a railroad's venue defense under a federal law); *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 21 (1923) (holding that state law rules of burden of proof could not be applied to "narrow[] the protection that the defendant had secured" under a federal law limiting railroad liability). In *Brown* v. *Western Railway of Alabama*, 338 U.S. 294 (1950), this Court held that "a federal right cannot be defeated by the forms of local practice" and that "[s]hould this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved." *Id.* at 296, 299. *Brown* concerned a claim for damages under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* The defendant filed a demurrer on the ground that the complaint did not set forth a cause of action. The Georgia courts agreed,

stating that the presence in a rail yard of a large clinker, on which plaintiff injured himself, could not be construed as an act of negligence by the defendant railroad in light of a state court rule of construction that required pleading allegations to be construed most strongly against the pleader. This Court granted certiorari "because the implications of the dismissal were considered important to a correct and uniform application of the federal act in the state and federal courts," and it reversed the state court. 338 U.S. at 295, 299. "'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers,'" declared this Court, "'the assertion of federal rights, when plainly and reasonably made is not to be defeated under the name of local practice.'" *Id.* at 299 (quoting *Davis*, 263 U.S. at 24).

It is difficult to draw any conclusion other than that the Ohio Supreme Court decision reflects hostility to *Shanklin* pre-emption of state tort law remedies for plaintiffs. This case did not meet the Ohio Supreme Court's standards for discretionary appeals; the pedestrian issue of evidentiary sufficiency that had been decided by the court of appeals is not "a question of public or great general interest." Ohio Sup. Ct. R. II.1(A)(3). Moreover, as the dissent made clear, the majority below reached its conclusion only by disregarding state precedent on the requirements for "personal knowledge" under state summary judgment law, Pet. App. 15a (Kline, J., dissenting), and a more than century-old rule against the reweighing of evidence by an appellate court, see, *e.g.*, *McLaughlin* v. *Wheeling & Lake Erie Railway*, 61 Ohio St. 279, 281-82, 55 N.E. 825, 826 (1899). Most significantly, it is a patent repudiation of this Court's precedents for a state court to rule that the State's Manager of Grade Crossing Safety Programs – who testified that the Buckeye Crossbuck Program for installing crossbucks at this and other crossings was 100% federally funded, and who had direct involvement in both the drafting and implementation of ODOT's project agreement with the FHWA and W&LE's contract to install

the devices – lacked personal knowledge that "Federal-aid funds participate[d] in the installation of the devices" at the Howe Road crossing, 23 C.F.R. § 646.214(b)(3), simply because she did not personally witness any disbursement of federal funds to the state for this project. Neither the Respondent nor the court below can dispute in good faith that the Buckeye Crossbuck Program and the Howe Road crossbuck are federally funded and that state tort law at the crossing is pre-empted. The court below has simply twisted an evidentiary rule to erect a false procedural obstacle to defeat assertion of a federal pre-emption defense.

This Court has been particularly vigilant to prevent the imposition or application of state court rules that place special burdens on the assertion of federal rights. It is well established that "[a] state may not discriminate against rights arising under federal laws," *McKnett* v. *St. Louis & San Francisco Railway*, 292 U.S. 230, 234 (1934), for the Supremacy Clause of the United States Constitution expressly states that the United States Constitution "and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. "The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 371 (1990) (refusing to permit state courts to create special defenses applicable solely to a federal cause of action); *Testa* v. *Katt*, 330 U.S. 386, 394 (1947) (reversing a state court decision refusing to exercise jurisdiction over a cause of action under a federal act where the cause of action was within the scope of the state court's authority). These principles are equally applicable to the defense of federal pre-emption – which is itself a means of enforcing the Supremacy Clause. *Mondou* v.

New York, New Haven, & Hartford Ry., 223 U.S. 1, 54-55 (1912). This Court cannot tolerate the uniquely stringent application by state courts of facially neutral evidentiary rules to defeat a defense established by federal law, as the Ohio Supreme Court and other state courts have done.

This case presents questions that are significant not only in the area of railway safety regulation, an area in which national uniformity is mandated by federal statute, 49 U.S.C. § 20106, but also in all other areas of federal pre-emption that require factual findings. This Court's intervention is critical to guard against state evasion of federal law and the resulting court-by-court variations in the application of federally created defenses.

II. THE OHIO SUPREME COURT'S PRE-EMPTION STANDARD CONFLICTS WITH THE PLAIN MEANING OF THE REGULATIONS AND DECISIONS OF THIS COURT AND THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The legal predicate of the Ohio Supreme Court's ruling – that *Easterwood/Shanklin* pre-emption requires evidence of the actual disbursement of federal funds – is contrary to the plain meaning of the regulations and in conflict with the decisions of this Court in *Shanklin* and of the United States Court of Appeals for the Tenth Circuit. In fact, the Ohio court did not even cite *Shanklin* to determine when federal law pre-empted state tort law, but instead relied on an Ohio case, *Carpenter* v. *Consolidated Rail Corp.*, 69 Ohio St. 3d 259, 631 N.E.2d 607 (1994), which pre-dated *Shanklin*. *Carpenter* required that "federal funds must actually have been *committed and spent*" before pre-emption would occur. *Id.* at 263, 631 N.E.2d at 610 (emphasis added). In applying this rule without analysis of the regulations or the controlling federal case law, the Ohio Supreme Court erroneously required evidence of actual payment, rather than "participation" of federal funds, the standard prescribed by

federal law. See Pet. App. 11a n.10 ("[w]e also note that W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project").

Pre-emption occurs whenever the federal warning device regulations are "applicable," and by their plain terms the regulations are applicable to "any project where Federal-aid funds participate in the installation of the [warning] devices" at a crossing. 23 C.F.R. § 646.214(b)(3). "Participation" is not synonymous with final payment. Federal funds participate whenever reimbursable work is performed pursuant to an authorized federal-aid highway project (*i.e.*, one to which federal funds are committed by an executed project agreement between the FHWA and the State). The statute is explicit on this point: "[t]he execution of the project agreement [by the Secretary of Transportation] shall be deemed a contractual obligation of the Federal Government for the payment of the Federal share of the cost of the project." 23 U.S.C. § 106(a)(3).[12] As the FHWA has explained:

> An obligation is a commitment – the Federal government's promise to pay the States for the Federal share of a project's eligible cost. This commitment occurs when the project is approved and the project agreement is executed. Obligation is a key step in financing. *Obligated funds are considered "used" even though no cash is transferred.*

Federal Highway Admin., U.S. Dep't of Transp., *Financing Federal-Aid Highways* 16 (1999) (emphasis added, footnote omitted). Courts have also recognized that federal funds are obligated as soon as the agreement is signed. See *Maine* v. *Goldschmidt*, 494 F. Supp. 93, 95 (D. Me. 1980); *Tennessee*

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[12] The prior version of 23 U.S.C. § 106 included almost the same words: "[The Secretary's] approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." 23 U.S.C. § 106(a) (1990).

ex rel. Leech v. *Dole*, 567 F. Supp. 704, 711 (M.D. Tenn. 1983) ("Obligation is the key step because obligated funds are considered 'expended' even though no cash is transferred."), *rev'd on other grounds*, 749 F.2d 331 (6th Cir. 1984).

The federal regulations in 23 C.F.R. parts 140 and 646 underscore that the "participation" of federal funds has nothing to do with disbursement. Under the regulations, "[t]he costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation." 23 C.F.R. § 646.216(e)(1); see also *id.* § 140.904(b). When any of that eligible work is in fact performed, federal funds participate in that work and in the costs incurred. See, *e.g.*, *id.* §§ 646.216(c)(3) (imposing limitations on railroad charges "[w]here Federal funds participate in the cost of replacement right-of-way . . ."), 646.216(b)(2) (describing conditions under which "Federal aid funds may participate in the amounts paid to engineering consultants"), 140.907(b) (rules for federal participation in overhead and indirect construction costs), 140.801 ("reimbursement criteria for Federal participation in project related audit expenses").

The Ohio Supreme Court's requirement that a railroad may prevail on a pre-emption defense only if it can prove actual disbursement of federal funds for specific devices (by documentary evidence or testimony of a witness with personal knowledge of payment)[13] ignores not only the plain language

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[13] The Ohio Supreme Court's determination that Kirkland lacked personal knowledge of disbursement stems from a misunderstanding, advanced by Respondent, of the reimbursement process for federally funded projects. Respondent emphasized that Kirkland did not "mak[e] deposits of federal funds," Kirkland Dep. at 13 ll. 15-16, and for that reason argued that she lacked personal knowledge about payment. The Ohio Supreme Court agreed that Kirkland lacked personal knowledge, which it defined as knowledge "'perceived through one or more of the

of the regulation but also this Court's test for pre-emption. As this Court has held, "§§ 646.214(b)(3) and (4) pre-empt state tort claims concerning the adequacy of *all* warning devices installed with the *participation of federal funds*." *Shanklin*, 529 U.S. at 357 (second emphasis added); see also *Easterwood*, 507 U.S. at 671. This Court properly understood that pre-emption occurs when the State commences work on the installation of the devices after FHWA approval:

> *When the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds*, §§ 646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state and tort law addressing the same subject. *At that point*, the regulation dictates "the devices to be installed and the means by which railroads are to participate in their selection." *Easterwood*, *supra*, at 671. It is this displacement of state law concerning the devices' adequacy, and not the State's or the FHWA's adherence to [federal] standard[s] . . . that pre-empts state tort actions.

Shanklin, 529 U.S. at 357 (emphasis added).

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senses of the witness.'" Pet. App. 10a. However, the federal government does not cut checks and send them to state employees for "deposit." Rather, the standard practice is for the United States Treasury Department to make an electronic fund transfer to the state's bank account for the federal share of a highway project's cost. *Financing Federal-Aid Highways*, *supra*, at 18. This occurs after the railroad is reimbursed by the state, and the state then submits vouchers to the FHWA, which approves them and transmits them to the Treasury Department. *Id.*; 23 C.F.R. § 140.922. It is not surprising, then, that Kirkland testified that she did not have direct personal knowledge of the receipt and transfer of federal funds. *See* Kirkland Dep. at 14-15; Pet. App. 10a. Indeed, it is apparent that no one involved in the use of federal funds would have had the type of "personal knowledge" of deposit required by the Ohio court because the funds are instead transferred by the Treasury Department. In any event, the actual disbursement of federal funds to the State is irrelevant to pre-emption, as discussed *supra* at 19-21.

Thus, pre-emption under *Shanklin* requires proof of the participation of federal funds in device installation, not proof that federal funds were actually disbursed to pay for a device at a particular crossing. Susan Kirkland testified without contradiction that the FHWA approved the Buckeye program, that W&LE executed a contract with the State to install the Buckeye crossbucks at its crossings, including Howe Road, and that she knew these things from her direct participation in the administration of the program and the drafting of one of the agreements that was based on federal funding.

The Ohio Supreme Court's erroneous focus on actual payment, rather than on the required "participation" of federal funds, also places it in direct conflict with the United States Court of Appeals for the Tenth Circuit, which properly interprets the federal "participation" standard and specifically finds pre-emption to occur before federal funds have reimbursed the final installation of the safety devices. See *Armijo* v. *Atchison, Topeka & Santa Fe Ry.*, 87 F.3d 1188, 1190 (10th Cir. 1996) (finding pre-emption at the beginning of a project when the Secretary of Transportation agreed to provide 90% of the funds for the crossbucks); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 561 (10th Cir. 1995) (finding pre-emption when federal funds were committed to preliminary engineering on a grade crossing improvement project, six years before final federal payment for the project).

The pre-emption standard employed by the Ohio Supreme Court is also illogical and unworkable. First, it makes no sense to hold that a federal regulation governing the *selection* of warning devices only has pre-emptive force when the project is complete and federal funds have been disbursed.[14]

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[14] Absent arrangements for progress payments, disbursement of federal funds occurs after completion of the project. When the project has been completed and inspected, the railroad (or other contractor) that performs the installation submits a final bill to the State. "The final billing should include certification that the work is complete, acceptable, and in accordance with the terms of the agreement." Federal Highway Admin.,

Second, there is no reason that the testimony of a disinterested state official in charge of federal crossing programs cannot suffice to establish the participation of federal funds in a project in which she was directly involved. Documentation of federal funding of crossing devices is often incomplete or unavailable, especially when accidents occur years after installation. The important federal policy of pre-emption cannot depend on the vagaries of recordkeeping practices at state highway agencies or regional FHWA offices. This Court should resolve the conflict of authority with *Shanklin* and the Tenth Circuit on the nature of federal funds "participation" that must be proven, and reject the standard adopted below that is at war with any rational scheme for judicial enforcement of FRSA pre-emption.

* * * *

This Court is the final guardian of federal law. It cannot allow a state court to impose state-law evidentiary requirements that are patently unjustified under prior precedents to defeat the valid assertion of a federal defense of pre-emption. Moreover, in order to make that evidentiary ruling, the Ohio Supreme Court invoked its own pre-*Shanklin* precedent to define a legal standard for pre-emption that directly conflicts with the rule of *Shanklin* and the Tenth Circuit, as well as the plain meaning of the federal statute and regulations. The ruling below undermines the national uniformity that Congress ordered in the FRSA, and represents an unwarranted evasion of *Shanklin* pre-emption that only this Court can correct. This Court's review is imperative.

CONCLUSION

The petition for a writ of certiorari should be granted.

U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* 189 (2d ed. 1986). The railroad is reimbursed by the State, and the State in turn seeks reimbursement from the federal government. *See* 23 C.F.R. § 140.904(a).

Respectfully submitted,

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September 4, 2002

APPENDICES

APPENDIX A

SUPREME COURT OF OHIO

No. 2000-2278

BONACORSI,

Appellant,

v.

WHEELING & LAKE ERIE RAILWAY COMPANY,

Appellee.

Submitted Jan. 29, 2002.
Decided May 22, 2002.

DOUGLAS, J.

{¶ 1} In July 1996, plaintiff-appellant, Cris A. Bonacorsi, was seriously injured[1] when the motorcycle he was driving collided with the engine of a freight train at a railroad crossing on Howe Road in Brimfield Township, Ohio. The train was owned and operated by defendant-appellee, Wheeling & Lake Erie Railway Company ("W&LE").

{¶ 2} At the time of the accident, signs were posted along Howe Road warning westbound motorists, such as Bonacorsi, of the upcoming crossing. Posted approximately eight hundred fifty feet before the crossing was a round, yellow sign with a large black X flanked by two Rs. Next, about seven hundred feet from the crossing, the pavement was painted with a large white X flanked by two Rs. Three hundred feet before the crossing, the pavement marking was

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[1] Among other injuries, Bonacorsi's left leg was amputated at the hip, his pelvis was fractured, and one of his lungs collapsed.

repeated. Immediately before the crossing were a red triangular "yield" sign and a white, X-shaped sign with the words "RAILROAD CROSSING" written in black ("cross-buck sign"). The signs and pavement markings described above are classified as "passive warning devices" because they indicate the presence of a crossing but they do not change in any respect when a train is approaching. Section 646.204, Title 23, C.F.R. In contrast, "active warning devices" are traffic control devices activated by the approach of a train, such as flashing light signals and automatic gates that warn motorists that a train is approaching the crossing. Id.

{¶ 3} On the day of the accident Bonacorsi was aware that he was approaching a crossing, but because there were no active warning devices at the crossing and because foliage growing near the railroad right-of-way blocked his view, he was unaware that a train was also approaching the crossing[2] As Bonacorsi neared the tracks his line of sight became less obstructed by the foliage and he was able to see the approaching train, but he was travelling too fast to avoid a collision.

{¶ 4} Bonacorsi subsequently filed a claim against W&LE alleging that the accident was caused by W&LE's negligence "in failing to install active warning devices, failing to eliminate view obstructions caused by the foliage surrounding its crossing, failing to operate the train in a safe and lawful manner, including maintaining a proper lookout and

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[2] Archie Burnham, a professional engineer specializing in traffic safety, testified that at the time of the accident when a westbound motorist was three hundred forty feet from the crossing, foliage obstructed the motorist's view of all but twenty-eight feet of the railroad tracks north of the crossing. He further testified that, taking into account the posted speed limit of Howe Road (forty miles per hour) and the train speed limit (twenty-five miles per hour), published safety guidelines provide that at three hundred forty feet from the crossing, westbound motorists should be able to see at least two hundred sixty feet of the track north of the crossing in order to stop their vehicles in reaction to seeing a train.

maintaining control over the train so that it could avoid a collision, and by failing to properly sound the train's horn and bell."[3]

{¶ 5} W&LE moved for partial summary judgment asserting that Bonacorsi's claim that the warning devices were inadequate was preempted by federal law. In this regard, W&LE asserted that federal funds paid for the installation of the crossbuck sign posted on Howe Road and that warning devices installed using federal funds are adequate as a matter of federal law.[4] Thus, W&LE argued, the subject of warning-

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[3] Bonacorsi further alleged that because W&LE was aware of prior accidents at this crossing, its conduct in failing to install active devices and/or failing to eliminate the sight obstruction at this crossing constituted willful and wanton misconduct and illustrated a conscious disregard for the rights and safety of others. Thus, Bonacorsi argued that he was entitled to punitive as well as compensatory damages. The trial court refused to submit the punitive damages claim to the jury

[4] {¶ a} Section 646.214(b), Title 23, C.F.R. provides:

{¶ b} "(3)(i) 'Adequate warning devices' * * * on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

{¶ c} "(A) Multiple main line railroad tracks.

{¶ d} "(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

{¶ e} "(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

{¶ f} "(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

{¶ g} "(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

{¶ h} "(F) A diagnostic team recommends them.

device adequacy with regard to the Howe Road signs has been covered, thereby triggering the preemption provision of Section 20106, Title 49, U.S.Code.[5]

{¶ 6} As proof that federal funds were used to install the Howe Road crossbuck sign, W&LE submitted an affidavit executed by Bruce Brown, an employee of W&LE, stating that prior to the accident the crossbuck sign at the Howe Road crossing was installed with federal funds as part of Ohio's Buckeye Crossbuck Program. Attached as an exhibit to Brown's affidavit was a pamphlet created by the Ohio Department of Transportation ("ODOT"), titled "Ohio's Buckeye Crossbuck Program." The pamphlet described an experimental program designed to determine the effectiveness of a newly designed crossbuck sign. According to the pamphlet, the program required that crossbuck signs at all passive crossings in Ohio be replaced with new crossbuck signs.[6]

{¶ i} "(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA [Federal Highway Administration] may find that the above requirements are not applicable.

{¶ j} "(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

[5] {¶ a} Section 20106, Title 49, U.S.Code provides:

{¶ b} "Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement."

{¶ c} Although the preemption provision contains an exception, it is inapplicable in this case.

[6] According to ODOT's pamphlet, there were more than three thousand seven hundred passive crossings in Ohio when the Buckeye Crossbuck Program began. The program required that crossbuck signs at one-half of the passive crossings, selected at random, were to be replaced with

{¶ 7} Also attached to Brown's affidavit was an agreement between ODOT and W&LE, wherein W&LE agreed to replace existing crossbuck signs at all of its passive crossings in Ohio by the end of 1993 as part of the Buckeye Crossbuck Program. ODOT agreed to supply the new crossbuck signs and to reimburse W&LE for its installation costs. The agreement indicated that the reimbursement money would come from federal funds.

{¶ 8} In his brief opposing W&LE's motion, Bonacorsi attacked the sufficiency of Brown's supporting affidavit, arguing that the affidavit was not based on Brown's personal knowledge that federal funds were spent on the installation of the crossbuck sign at the Howe Road crossing. See Civ.R. 56(E), which requires that affidavits in support of motions for summary judgment be made on "personal knowledge." In addition, Bonacorsi argued that even if W&LE could prove that federal funds had been used to install the crossbuck sign, that fact alone would not be sufficient to trigger preemption. Bonacorsi argued that W&LE was also required to show that the Federal Highway Administration ("FHWA") had approved the installation.

{¶ 9} W&LE replied that proof of federal funding was sufficient, in and of itself, to trigger preemption because when federal funds are used to install warning devices at a railroad crossing it is presumed that the devices meet FHWA approval and thus meet the federal standards of adequacy.

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the newly designed Buckeye crossbuck signs (described as a "highly reflectorized red and white" crossbuck sign) and the other half with standard black-and-white crossbuck signs that had been "upgraded" with reflective tape on all four sides of the post. The Howe Road crossing fell into the latter category, i.e., the crossbuck sign installed at the Howe Road crossing was the upgraded standard crossbuck sign. Once the new signs were in place, ODOT planned to study accident statistics and human behavior at the crossings to compare the effectiveness of both types of signs.

{¶ 10} The trial court agreed with Bonacorsi and found that W&LE had failed to prove that federal funds were used to install the crossbuck sign. In addition, the trial court rejected W&LE's assertion that federal funding of sign installation was, in and of itself, sufficient to trigger preemp tion of an inadequate-signalization claim, and held that proof of FHWA approval was also required in this case. Accordingly, the court denied W&LE's motion for partial summary judgment.

{¶ 11} Thereafter, W&LE, with leave of court, filed an additional motion for partial summary judgment, again arguing that Bonacorsi's inadequate-warning-device claim was preempted. Attached to the motion was an affidavit executed by Susan Kirkland, an employee of the Ohio Rail Development Commission.[7] In her affidavit, Kirkland stated that the crossbuck signs installed at all passive crossings in Ohio, including W&LE crossings, were installed with federal funds as part of the Buckeye Crossbuck Program.

{¶ 12} In his response to W&LE's motion, Bonacorsi argued that Kirkland, like Brown, did not have personal knowledge of the statements made in her affidavit regarding federal funding of the installation of the Howe Road crossbuck sign. In support of his assertion, Bonacorsi referred to Kirkland's deposition testimony in which Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge of federal funding of sign installation at railroad crossings came from other people. In addition to his argument that Kirkland lacked the personal knowledge required by Civ.R. 56(E), Bonacorsi renewed his assertion that proof of federal funding alone was insufficient to preempt a state-law claim of inadequate warning devices.

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[7] The Ohio Rail Development Commission was created by R.C. 4981.02(A).

{¶ 13} The court agreed with Bonacorsi that federal funding alone was not sufficient to trigger preemption and, consequently, denied W&LE's motion. The court did not discuss whether Kirkland's affidavit was sufficient to establish that federal funds were used to install the Howe Road crossbuck sign.

{¶ 14} W&LE subsequently moved to vacate the court's denial of its motion for partial summary judgment.[8] The court again reviewed W&LE's additional motion for partial summary judgment, and again denied it. The court stated, "While federal funds may have been used in the purchase and/or installation of the * * * crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administration approved the * * * crossbuck signs as being adequate to protect motorist safety at such crossing."

{¶ 15} Thereafter, the matter proceeded to a jury trial. The jury found for Bonacorsi, but further found that both Bonacorsi and W&LE were negligent and determined that each party's negligence contributed equally to causing the accident. In response to a written jury interrogatory labeled "One-A" that asked, "If you find that [W&LE] was negligent, in what respect(s) do you so find?" the jury responded in writing, "Two prior accidents; railroad did not initiate change in signals and signs. Proving ordinary care. Plaintiff unable to see the train."

{¶ 16} The jury determined that Bonacorsi's compensatory damages were $1,664,200. Reducing the verdict by fifty percent to account for Bonacorsi's contributory negligence, the trial court entered judgment in favor of Bonacorsi in the amount of $832,100.

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[8] W&LE's motion to vacate alleged that the order denying its motion for partial summary judgment was invalid because Judge Sinclair issued the order after Judge Lile had been assigned to preside over the matter

{¶ 17} W&LE appealed raising numerous assignments of error.[9] The assignment relevant to this appeal asserted that the trial court erred in denying W&LE's motion for partial summary judgment.

{¶ 18} The court of appeals, upon de novo review of W&LE's motion for partial summary judgment, found that Kirkland's affidavit established that federal funds had been used to pay for installation of the Howe Road crossbuck sign. In addition, the court held that proof of federal funding was, in and of itself, sufficient to trigger preemption of Bonacorsi's inadequate-warning-device claim. In support of its holding the court cited *Norfolk S. Ry. Co. v. Shanklin* (2000), 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374, which was decided while this case was pending in the court of appeals. Consequently, the court of appeals reversed the trial court's denial of W&LE's motion for summary judgment on Bonacorsi's inadequate-warning-device claim.

{¶ 19} Moreover, the court found that the jury's response to Interrogatory One-A clearly revealed that the jury's verdict against W&LE was based solely on Bonacorsi's inadequate-warning-device claim. Accordingly, the court reversed the jury's verdict, vacated Bonacorsi's award, and entered judgment in favor of W&LE.

{¶ 20} The cause is before this court upon our allowance of a discretionary appeal.

{¶ 21} There are two issues before the court in this case. The first issue is whether the court of appeals erred in reversing the trial court's denial of W&LE's motion for partial summary judgment. Only if we find that the reversal was proper do we reach the second issue in this case, which is whether the court of appeals erred in interpreting the jury's

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[9] Bonacorsi cross-appealed with regard to the trial court's failure to submit the issue of punitive damages to the jury. See footnote 3.

response to Interrogatory One-A to mean that the jury found W&LE negligent only with regard to Bonacorsi's inadequate-signalization claim.

{¶ 22} With regard to the first issue, Bonacorsi claims that the court of appeals erred in two respects. First, he argues that the court erred in finding that Kirkland's affidavit proved that federal funds paid for the installation of the Howe Road crossbuck sign. In this respect, Bonacorsi renews the argument he made to the trial court and the court of appeals, i.e., that Kirkland lacked personal knowledge of the statements made in her affidavit.

{¶ 23} Second, Bonacorsi argues that the court of appeals erred in applying the holding in *Shanklin*, 529 U.S. 344, 120 S.Ct. 1467, 146 L.Ed.2d 374, to this case. In this regard, Bonacorsi asserts that *Shanklin* applies only when federal funds are applied toward railroad crossing *improvement* programs and not when applied toward *experimental* programs such as the program under which the crossbuck sign at the Howe Road crossing was installed. Consequently, Bonacorsi argues, even if the court finds that Kirkland's affidavit does prove federal funding, his inadequate-signalization claim was not preempted because the federal regulation regarding sign adequacy, interpreted by the court in *Shanklin*, did not apply to the program responsible for installing the Howe Road crossbuck sign.

{¶ 24} Our review of summary judgment rulings is de novo. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243. Accordingly, we apply the same standard as the trial court and court of appeals in this case. Civ.R. 56(C) provides that summary judgment shall be granted when the filings in the action, including depositions and affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

{¶ 25} We first review Kirkland's affidavit to determine whether it establishes that federal funds paid for the installation of the Howe Road crossbuck sign. Proof of federal funding is crucial to W&LE's preemption argument because the federal regulation that covers the subject of warning-device adequacy applies only to warning devices installed with federal funds. Section 646.214(b)(3)(i), Title 23, C.F.R. (see footnote 4); *Carpenter v. Consol. Rail Corp.* (1994), 69 Ohio St.3d 259, 263, 631 N.E.2d 607 ("Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent").

{¶ 26} Civ.R. 56(E) requires that affidavits supporting motions for summary judgment be made on personal knowledge. *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.* (1994), 69 Ohio St.3d 217, 223, 631 N.E.2d 150. For obvious reasons, this is the same standard as applied to lay witness testimony in a court of law. Id.; Evid.R. 602. "Personal knowledge" is "[k]nowledge gained through first-hand observation or experience, as distinguished from a belief based on what someone else has said." Black's Law Dictionary (7th Ed.Rev.1999) 875. See, also, Weissenberger's Ohio Evidence (2002) 213, Section 602.1 ("The subject of a witness's testimony must have been perceived through one or more of the senses of the witness. * * * [A] witness is 'incompetent' to testify to any fact unless he or she possesses firsthand knowledge of that fact.").

{¶ 27} Kirkland explicitly states in her affidavit that she had "personal knowledge" that federal funds were used to install crossbuck signs at all Ohio railroad crossings marked with passive warning devices. In her deposition, however, Kirkland testified that ODOT was responsible for handling federal funds, that she did not work for ODOT, and that her knowledge that federal funds were used to install signs at railroad crossings came from other people.

{¶ 28} After reviewing Kirkland's deposition testimony we find that she clearly lacked the personal knowledge required by Civ.R. 56(E) to support the statements in her affidavit regarding federal funding. Consequently, we find that W&LE failed to prove that federal funds paid for the installation of the Howe Road crossbuck sign.[10] Because, at a minimum, federal funding is required to trigger preemption, we hold that W&LE's motion for partial summary judgment should not have been granted.

{¶ 29} Our holding renders moot Bonacorsi's second argument with regard to W&LE's motion for partial summary judgment, i.e., his assertion that *Shanklin* does not apply to this case. In addition, we do not reach the second issue in this case, which was dependent on a finding that partial summary judgment was proper.

{¶ 30} For the foregoing reasons, we reverse the judgment of the court of appeals and reinstate the judgment of the trial court and the verdict of the jury.

Judgment reversed.

RESNICK, FRANCIS E. SWEENEY, SR. and PFEIFER, JJ., concur.

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[10] We also note that W&LE failed to tender any documentary evidence to show that the state received money from the federal government to pay for the Buckeye crossbuck project or to show that there was an agreement executed by the federal government indicating that it would pay for the project. A federal statute that was in effect at the time this project was allegedly funded required the Secretary of the United States Department of Transportation to enter into a formal project agreement with state transportation departments concerning projects that were to receive federal funding under Title 23, U.S.Code. Former Section 110, Title 23, U.S.Code, 72 Stat. 894. Although Kirkland testified in her deposition that there was an executed agreement between the state of Ohio and the FHWA regarding the project, and W&LE, in its brief submitted to this court, refers to a contract between the FHWA and the state of Ohio, no such agreement is contained in the record.

MOYER, C.J., KLINE and LUNDBERG STRATTON, JJ., dissent.

ROGER L. KLINE, J., of the Fourth Appellate District, sitting for COOK, J.

ROGER L. KLINE, J., dissenting.

{¶ 31} I respectfully dissent. In my view, the trial court and the court of appeals did not err when they considered Susan Kirkland's affidavit as admissible evidence because W&LE presented sufficient evidence to establish that the affidavit met the Civ.R. 56(E) "personal knowledge" requirement. Kirkland's description of her job duties allowed an inference that she would be in a position to know if federal funds were used to install the crossbuck signs at the Howe Road crossing.

{¶ 32} I agree with the majority that a court ruling on a motion for summary judgment first must determine what evidence is admissible before it may construe that evidence in the opposing party's favor. Civ.R. 56(E). I further agree that the "personal knowledge" requirement set forth in Civ.R. 56(E) is the same standard contained in Evid.R. 602 for a lay witness testifying at trial. The trial court has discretion in determining whether evidence is admissible. See, e.g., *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 616, 687 N.E.2d 735.

{¶ 33} 1 McCormick on Evidence (5th Ed.1992) 40, Section 10, addresses the personal knowledge requirement by commenting:

{¶ 34} "A person who has no knowledge of a fact except what another has told him does not, of course, satisfy the requirement of knowledge from observation. When the witness, however, bases his testimony partly upon firsthand knowledge and partly upon the accounts of others, the problem is one which calls for a practical compromise. As a case in point, when a witness speaks of his own age or his

kinship with a relative, the courts allow the testimony. * * * In short, when the witness testifies to facts that he knows partly at first hand and partly from reports, the judge should admit or exclude according to the overall reliability of the evidence." (Footnotes omitted.)

{¶ 35} In *Akron-Canton Waste Oil. Inc. v. Safety-Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 611 N.E.2d 955, the court of appeals upheld the trial court's admission of the testimony of a secretary for the purpose of showing the intention of her corporate employer. The secretary had contact with the managers and the corporate employees and, essentially, ran the office. Her bosses disclosed their intentions to her when they gave her instructions to perform the operations of the company. The court concluded that she had based her testimony on personal knowledge. "Her description of her job duties also allowed an inference that she would be in a position to know the reasons for the various practices of the corporation." Id. at 597, 611 N.E.2d 955.

{¶ 36} The above McCormick quotation and the holding in *Akron-Canton Waste Oil* led this court in *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 450, 687 N.E.2d 422, to interpret the personal knowledge requirement contained in Evid.R. 602 and find that a trial court may admit testimony based partly on firsthand knowledge and partly upon the accounts of others. This court found that a witness who had personal knowledge of a taxpayer's purchase of twelve parcels of property and a taxpayer's strategy in assigning an artificially high purchase price to one parcel could testify for the purpose of showing that this allocation did not reflect the true value of the parcel in question. The witness's job allowed him access to the following information:

{¶ 37} "[H]e attended and participated in corporate management meetings at which the sale and the strategy for allocating the purchase price were discussed. He oversaw

'property taxes, insurance, financial reporting, corporate, federal and state income tax filings, among other things.' His duties included administering the purchased properties. The [Board of Tax Appeals] could infer that he collaborated in devising the allocation strategy and could find that he incorporated the allocation decision in his reporting and filing duties." Id. at 453, 687 N.E.2d 422.

{¶ 38} In this case, the majority summarizes Kirkland's disposition testimony as revealing that "ODOT was responsible for handling federal funds, that [Kirkland] did not work for ODOT, and that her knowledge that federal funds were used to install signs at railroad crossings came from other people." However, a closer examination of Kirkland's deposition reveals that she testified as follows: As a manager of the safety programs at the Ohio Rail Development Commission, Kirkland was one of many people responsible for carrying out the Buckeye Crossbuck Program. The Public Utilities Commission of Ohio ("PUCO") designed the crossbuck program and sent a directive to Kirkland's employer to implement it. As manager of the safety section, she was responsible for setting up the funds, reviewing the plans, and processing the bills for the crossbuck program. She attended meetings and helped set up the parameters and the procedures of the program. She helped draft an agreement between ODOT and W&LE in which ODOT agreed to supply all new crossbuck signs at passive crossings and to reimburse W&LE from federal funds for its installation costs.

{¶ 39} Kirkland also testified that she helped draft an agreement with the FHWA involving the administration of the crossbuck program. She and her staff had to follow the directives of the FHWA when they carried out the crossbuck program. The agreement provided that the federal funds for the signs and program would flow from the federal government to the state of Ohio by routing the funds from FHWA to ODOT. Kirkland's staff was involved in the payments made for the standard crossbuck signs at the Howe

Road crossing. However, she stated that her knowledge that federal funds were used to install the crossbuck signs at the Howe Road crossing was based on what others told her. While administering the crossbuck program, her employer (the Ohio Rail Development Commission) was within ODOT and was called the Rail Division.[11] The ODOT Rail Division distributed an educational brochure for the Buckeye Crossbuck Program.

{¶ 40} Kirkland's deposition testimony reveals that her job allowed her access to information regarding the crossbuck program similar to that possessed by the witness in *Dublin Bd. of Edn.*, 80 Ohio St.3d 450, 687 N.E.2d 422. As manager of the safety section, she set up the funds, processed the bills, and reviewed the plans of the program. She attended meetings where the parameters and procedures were established, helped draft agreements involving ODOT, W&LE, and FHWA that included funding, and followed the directives of FHWA to carry out the program. Her description of her job duties allowed the trial court to infer that she would be in a position to know whether federal funds paid for the installation of the crossbuck signs at the Howe Road crossing. Therefore, Kirkland had personal knowledge to state in her affidavit that federal funds were used to install crossbuck signs at all passive crossings in Ohio. Consequently, the trial court did not abuse its discretion in considering this affidavit,[12] and the court of appeals did not err in finding that Kirkland had personal knowledge.

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[11] At the time of her deposition, Kirkland and her attorney stated that her employer is affiliated with ODOT but is legally not a division of ODOT. The Ohio legislature "created the Ohio [R]ail [D]evelopment [C]ommission, as an independent agency of the state within [ODOT]." R.C. 4981.02(A). The director of ODOT is an ex officio member of the commission. Id.

[12] The trial court implicitly found that Kirkland had personal knowledge when it overruled Bonacorsi's motion to strike the affidavit.

{¶ 41} I would affirm the court of appeals' judgment on the "personal knowledge" issue and address the other issues in this appeal.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing dissenting opinion.

However, the trial court never found that W&LE had established that federal funds were used to install the crossbuck sign at the Howe Road crossing. Instead, it denied the partial motion for summary judgment on another ground. Thus, the court of appeals had authority to review the "personal knowledge" issue but did not have the authority to find that federal funds were used to install the sign in question because it did not have anything from the trial court to review. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138; see, also, *Fulmer v. Insura Prop. & Cas. Co.* (2002), 94 Ohio St.3d 85, 99-100, 760 N.E.2d 392 (Cook, J., dissenting); *Bowen v. Kil-Kare, Inc.* (1992), 63 Ohio St.3d 84, 89, 585 N.E.2d 384.

APPENDIX B

COURT OF APPEALS OF OHIO
FIFTH DISTRICT
STARK COUNTY

No. 1999CA0047

CRIS A. BONACORSI,
Plaintiff-Appellee,

v.

WHEELING AND LAKE ERIE RAILWAY CO.,
Defendant-Appellant.

Nov. 6, 2000.

Civil Appeal From Stark County
Court of Common Pleas Case.

GWIN, P.J., HOFFMAN, J., and READER, V.J.

OPINION

READER.

Judgment reversed.

Defendant-Appellant/Cross-Appellee Wheeling & Lake Erie Railway Company (hereinafter "appellant") appeals from the February 25, 1999, May 7, 1999, June 29, 1999, August 16, 1999, and December 2, 1999, Judgment Entries of the Stark County Court of Common Pleas. Plaintiff-Appellee/Cross-Appellant Cris A. Bonacorsi (hereinafter "appellee") appeals from the September 3, 1999, Judgment Entry of such court.

STATEMENT OF THE FACTS AND CASE

On July 13, 1996, appellee Cris Bonacorsi was injured when the motorcycle he was driving struck the front wheels of a freight train owned by appellant Wheeling & Lake Erie Railway Company. The incident occurred at the Howe Road railroad crossing in Brimfield Township, Ohio. As a result of the collision, appellee suffered severe injuries including an amputated left leg, a collapsed lung, a pelvic fracture and a lacerated left arm. Thereafter, on July 10, 1998, appellee filed a complaint against appellant in the Stark County Court of Common Pleas. Appellee, in his complaint, alleged that appellant was negligent "in failing to install active warning devices, in failing to eliminate view obstructions caused by the foliage surrounding its crossing, failing to operate the train in a safe and lawful manner, including maintaining a proper lookout and maintaining control over the train so that it could avoid a collision, and by failing to properly sound the train's horn and bell." Appellee, who also alleged that appellant's conduct constituted willful and wanton misconduct, sought punitive damages in addition to compensatory damages. An answer was filed by appellant on August 10, 1998. Two Motions for Summary Judgment were filed by appellant on January 25, 1999. Appellant, in one of the motions, argued that it was entitled to judgment as a matter of law based on appellee's negligence and willful and wanton misconduct. In its second Motion for Summary Judgment, appellant argued that it was entitled to summary judgment on appellee's claim of inadequate signalization since such claim was preempted by federal law. A brief in opposition to both motions was filed by appellee on February 8, 1999. On February 19, 1999, appellant filed a separate Motion for Partial Summary Judgment on appellee's punitive damage claim. Four days later, appellant filed a reply brief in support of its January 25, 1999, Motions for Summary Judgment. Pursuant to a Judgment Entry filed on February 25, 1999, the trial court overruled appellant's Motion for

Summary Judgment on the issue of appellee's negligence and wanton and willful misconduct, finding that there were genuine issues of fact. As memorialized in a separate Judgment Entry filed the same day, the trial court also overruled appellant's Motion for Summary Judgment on this issue of inadequate signalization. In overruling such motion, the trial court stated that appellant had failed to establish that the crossbuck at the Howe Road railroad crossing was installed pursuant to a federally funded plan and that appellant had failed to establish that "the program [involving the installation of warning devices] had the approval of the FHWA [Federal Highway Administration] as a Federal Aid Project." Subsequently, on March 1, 1999, appellee filed a brief in opposition to appellant's Motion for Summary Judgment on the issue of punitive damages. Pursuant to a Judgment Entry filed on March 4, 1999, the trial court overruled such motion. With leave of court, appellant, on March 23, 1999, filed a second Motion for Summary Judgment on appellee's claim of inadequate signalization. Once again, appellant argued that such claim was preempted by federal law. In support of its motion, appellant submitted an affidavit signed by Susan Kirkland, the Manager of Grade Crossing Safety Programs, including the Ohio Buckeye Crossbuck Program, for the Ohio Rail Development Commission. Kirkland, in her affidavit, stated in part, as follows: 2. The Ohio Buckeye Crossbuck Program is a statewide research project providing for the evaluation of the Buckeye Crossbuck through the installation of both modified crossbuck signs and Buckeye Crossbuck signs at all Ohio passive public grade crossings, including Wheeling & Lake Erie Railway passive grade crossings. 3. The Ohio Buckeye Crossbuck Program was a federally-funded plan. The modified standard crossbuck signs and Buckeye Crossbuck signs that were installed by the Wheeling & Lake Erie Railway under the Ohio Buckeye Crossbuck Program were installed with federal money. 4. As explained in the

Agreement between the Ohio Department of Transportation and the Wheeling & Lake Erie Railway Company, attached as "Exhibit 1", the Ohio Buckeye Crossbuck Program was a Federal-aid project and the construction was financed with one hundred percent (100%) federal funds . . . 6. The Ohio Buckeye Crossbuck Program was approved by the Federal Highway Administration as a Federal-aid project.

Appellee later filed a Motion to Strike Paragraphs 3, 4, and 6 of Susan Kirkland's affidavit, arguing that Kirkland lacked personal knowledge of the conclusions made in such paragraphs. While the trial court declined to grant such motion, the trial court, as memorialized in a Judgment Entry filed on May 7, 1999, again overruled appellant's second Motion for Summary Judgment on the issue of inadequate signage. The trial court specifically held that "Kirkland's broad statement that the program 'was approved by the Federal Highway Administration as a Federal-aid project' does not establish that the program had the Secretary's specific approval of a warning system." After appellant filed a motion requesting, in part, that the May 7, 1999, Judgment Entry overruling appellant's second Motion for Summary Judgment be vacated, the trial court, pursuant to a Judgment Entry filed on June 29, 1999, overruled such motion. The trial court, in its June 29, 1999, entry, held that the principle of federal preemption was not applicable since "[w]hile federal funds may have been used in the purchase and/or installation of the Buckeye crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administration approved the Buckeye crossbuck signs as being adequate to protect motorist safety at such crossing." Subsequently, a jury trial commenced in this matter on July 6, 1999. On July 14, 1999, the jury returned with a verdict in favor of appellee and against appellant and awarded appellee damages in the amount of $1,664,200.00. The jury, in Interrogatory One-A, indicated that it found appellant negligent in the following respects: "Two prior accidents; railroad did not initiate

change in signals and signs. Proving ordinary care. Plaintiff unable to see the train." The jury, in its responses to the Interrogatories, further found that appellant and appellee were each 50% negligent and that their negligence was the proximate cause of appellee's injury. A Judgment Entry awarding appellee judgment against appellant in the amount of $832,100.00 was later entered by the trial court. Two weeks after the jury's verdict, appellee filed a motion for a new trial on the issue of punitive damages and a motion requesting prejudgment interest. On August 23, 1999, appellant filed a Motion for Judgment Notwithstanding the Verdict and a Motion for a New Trial. Subsequently, the trial court, pursuant to a Judgment Entry and Order filed on September 3, 1999, overruled appellee's Motion for a New Trial on the issue of punitive damages. In addition, after reviewing appellant's Motions for a new Trial and for Judgment Notwithstanding the Verdict, the briefs in opposition to the same and appellant's reply briefs, the trial court, pursuant to a Judgment Entry filed on December 2, 1999, overruled both motions. Following a hearing on appellee's Motion for Prejudgment Interest, the trial court, as memorialized in a Judgment Entry filed on December 2, 1999, awarded prejudgment interest to appellee in the amount of $302,100.00. In a Judgment Entry filed on December 28, 1999, the trial court corrected its December 2, 1999, entry to state that prejudgment interest would be calculated at the rate of 10% per year from July 13, 1996, the date of the accident. Appellant, in its briefs before this Court, now raises the following assignments of error:

> I THE TRIAL COURT ERRED IN FAILING TO GRANT WHEELING'S SUMMARY JUDGMENT MOTION ON PLAINTIFF'S INADEQUATE SIGNALIZATION CLAIM AND IN SUBMITTING THAT ISSUE TO THE JURY WHEN THAT THE [SIC] CLAIM WAS PRE-EMPTED BY FEDERAL LAW.

II THE TRIAL COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

III THE TRIAL COURT ERRED IN FAILING TO SUBMIT THE ISSUE OF PLAINTIFF'S RECKLESSNESS TO THE JURY.

IV THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE RAILROAD'S DUTY TO INSTALL EXTRA-STATUTORY WARNINGS AT ITS CROSSINGS WAS ONE OF "ORDINARY CARE," RATHER THAN ONE APPLYING ONLY TO EXTRA HAZARDOUS CROSSINGS.

V THE TRIAL COURT ERRED IN CHARGING THE JURY ON CLAIMS THAT WERE UNSUPPORTED BY THE EVIDENCE AND ON ALLEGED DUTIES THAT THE DEFENDANT DID NOT OWE.

VI THE TRIAL COURT ERRED IN ITS RULINGS ON THE ADMISSION OF EVIDENCE.

VII THE TRIAL COURT ERRED IN AWARDING PREJUDGMENT INTEREST.

Appellee, in turn, raises the following assignment of error in his cross- appeal:

THE TRIAL COURT ERRED AS A MATTER OF LAW IN REFUSING TO SUBMIT THE ISSUES OF WILLFUL AND WANTON MISCONDUCT AND PUNITIVE DAMAGES TO THE JURY.

I

Appellant, in its first assignment of error, argues that the trial court erred in failing to grant appellant's Motion for Summary Judgment on appellee's inadequate signalization

claim. We agree. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. Civ.R. 56(C) states in pertinent part: Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law . . . A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

Pursuant to the above rule, a trial court may not enter a summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing *Dresher v. Burt* (1966), 75 Ohio St.3d 280. It is based upon this standard we review appellant's first assignment of error. As is stated above, appellant filed a total of three separate motions arguing that appellee's inadequate signalization

claim was preempted by federal law. The trial court, in its February 25, 1999 Judgment Entry denying appellant's first Motion for Summary Judgment on such issue, held that appellant had failed to establish that the crossbuck at the Howe Road crossing was installed pursuant to a federally funded plan and that the program had the approval of the FHWA. Appellant, with leave of court, later filed a second Motion for Summary Judgment on the pre-emption issue. In support of such motion, appellant attached Susan Kirkland's affidavit in which she stated, based on her personal knowledge, that the Ohio Buckeye Crossbuck Program was a federal aid project that was financed with federal funds. However, the trial court once again denied appellant's Motion for Summary Judgment, stating in its May 7, 1999, Judgment Entry, in part, as follows: "After due consideration and in light of *Gollihue v. Consolidated Rail Corporation* (1997),120 Ohio App.3d 378, the court finds that there remain genuine issues of material fact which preclude summary judgment. Kirkland's broad statement that the program "was approved by the Federal Highway Administration as a Federal-aid project," does not establish that the program had the Secretary's specific approval of a warning system. The *Gollihue* court cited *Shots v. CSX Transp.* (C.A.7, 1994), 38 F.3d 304, summarizing that "the Secretary of transportation's approval of a state railroad agreement to install reflectorized crossbucks with federal funds was not a determination that these devices would adequately protect every crossing covered by the agreement."

Finally, in its June 29, 1999, Judgment Entry, the trial court noted that while federal funds may have been used with respect to the Buckeye crossbuck signs at the Howe Road crossing, there was no evidence that the FHWA had approved such signs. Because of the conflict among federal Courts of Appeals as to whether the FRSA [Federal Railroad Safety Act], by virtue of 23 CFR Sections 646.214(b)(3) and (4) (1999), preempts state law tort claims concerning a railroad's

failure to maintain adequate warning devices at crossings where federal funds were used in the installation of the devices, the United States Supreme Court granted certiorari in *Norfolk Southern Railway Co. v. Shanklin* (1999), 120 S.Ct. 370, to resolve such issue. Pursuant to an Opinion issued on April 17, 2000, in *Norfolk Southern Railway Co. v. Shanklin* (2000), 120 S.Ct. 1467, the United States Supreme Court resolved the conflict among the federal courts and held that the FHWA regulations addressed the adequacy of warning devices installed using federal funds and, therefore, pre-empt state law actions. In so holding, the United States Supreme Court stated as follows: Sections 646.214(b)(3) and (4) therefore establish a standard of adequacy that 'determine(s) the devices to be installed' when federal funds participate in the crossing improvement project. (Citation omitted) If a crossing presents those conditions in (b)(3), the State must install automatic gates and flashing lights; if the (b)(3) factors are absent, (b)(4) dictates that the decision as to what devices to install is subject to FHWA approval. . . .

As a result, once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating, the regulation 'displaces(s) state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. (Citation omitted.) *Shanklin*, 120 S.Ct. at 1474.

Sections 646.214(b)(3) and (4) 'cover the subject matter' of the adequacy of warning devices installed with the participation of federal funds. As a result, the FRSA pre-empts respondent's state court claim that the advance warning signs and reflectorized crossbucks . . . were inadequate. *Shanklin*, 120 S.Ct. at 1477.

While the Supreme Court recognized that nothing prohibited a State from using its own or additional federal funds to install more protective devices at railroad crossings,

it clearly stated that "[w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices". *Id.* at 1476. As established by the affidavit of Susan Kirkland, which was based on her personal knowledge as Manager of Grade Crossing Safety Program for the Ohio Rail Development Commission, federal funds were used to pay for the signs installed at the Howe Road crossing. Since the signs at the Howe Road crossing were installed with federal funds, pursuant to *Shanklin*, supra., appellee's inadequate signal-ization claims and in the case sub judice were pre-empted by federal law. Appellant's first assignment of error is, therefore, sustained. Numerous other assignments of error have been raised in this matter both by appellant and appellee. However, as is stated above, the jury, in Interrogatory One-A, indicated that it found appellant negligent in the following respects: "Two prior accidents; railroad did not initiate change in signals & signs. Proving ordinary care. Plaintiff unable to see train." Clearly, as evidenced by the above language, the judgment against appellant was based solely on appellee's inadequate signalization claim.

For such reason, based on this Court's disposition with respect to appellant's first assignment of error, the remaining assignments of error in this matter are moot. Accordingly, for the foregoing reasons, the judgment of the Stark County Court of Common Pleas is reversed and final judgment is entered in favor of appellant.

READER, V.J., GWIN, P.J., and HOFFMAN, J., concurs.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Jun 29, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

vs.

WHEELING AND LAKE ERIE RAILWAY CO., *et al.*,

Defendants.

JUDGMENT ENTRY

Judge Lile

This civil action came on for further consideration of the motion filed by the Defendant, Wheeling and Lake Erie Railway Co. regarding dismissal of this action due to preemption under federal law, and the motion filed by Plaintiff to exclude testimony of Patrolman Aaron Anweiler regarding the radar readout of the Plaintiffs's speed prior to the collision which is the subject of this lawsuit. Hearing was held on June 3, 1999, at which time the parties were present, or were represented by counsel.

Being advised in the premises, the Court does not find that the principle of federal preemption applies in this case. While federal funds may have been used in the purchase and/or installation of the Buckeye crossbuck signs at the Howe Road crossing, there is no evidence that the Federal Highway Administation approved the Buckeye crossbuck signs as being adequate to protect motorist safety at such crossing. Therefore, there is no basis for dismissal of this action, as requested by the defendant railroad.

For the reason that there is no evidence that the radar unit being used by patrolman Anweiler on Howe Road, Brimfield Township, on July 13, 1996, was calibrated, the Court will not permit the introduction of the radar readout displayed on the unit at the time that the Plaintiff's motorcycle was approaching Anweiler's police cruiser. However, other evidence of the Plaintiff's speed just prior to the collision, including opinion, accident reconstruction if noticed in discovery, and audio monitor, may be introduced.

It is Ordered.

/s/ Roger G. Lile
Judge Roger G. Lile

cc: Robert F. Linton, Jr. Esq.
Philip Howes, Esq./Kimberly Wyss, Esq.

APPENDIX D

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed May 7, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

vs

WHEELING & LAKE ERIE RAILWAY COMPANY, *et al,*

Defendants.

JUDGMENT ENTRY

Judge Sinclair

This matter is before the court on the additional motion for summary judgment filed by the Defendant, Wheeling & Lake Erie Railway Company ("W&LE"). Plaintiff filed a brief in opposition.

Defendant attached the affidavit of Susan Kirkland ("Kirkland"), Manager of Grade Crossing Safety Programs with the Ohio Rail Development Commission. As outlined in Kirkland's affidavit, the railroads were given an extension on the deadline for installing signs due to litigation over the contract for the manufacture of the Buckeye Crossbuck signs. Her affidavit also states that "the Ohio Buckeye Crossbuck Program was a Federal aid project and the construction was financed with one hundred (100%) federal funds." Finally, Kirkland's affidavit states that the program "was approved by the Federal Highway Administration as a Federal-aid project." Defendant requests summary judgment on the issue of preemption based on these statements.

After due consideration and in light of *Gollihue v. Consolidated Rail Corporation* (1997), 120 Ohio App.3d 378, the court finds that there remain genuine issues of material fact which preclude summary judgment. Kirkland's broad statement that the program "was approved by the Federal Highway Administration as a Federal-aid project," does not establish that the program had the Secretary's specific approval of a warning system. The *Gollihue* court cited *Shots v. CSX Transp.* (C.A. 7, 1994), 38 F.3d 304, summarizing that "the Secretary of Transportation's approval of a state railroad agreement to install reflectorized crossbucks with federal funds was not a determination that these devices would adequately protect every crossing covered by the agreement."

Under Ohio common law, railroads have a duty to use ordinary care to protect motorists from and warn them of trains occupying or approaching a highway crossing. *Matkovich v. Penn Cent. Transp. Co.* (1982), 69 Ohio St.2d 210. The measures a railroad must take to meet the duty is a question of fact, and they may include extra-statutory forms of warning. *Id.*

-In light of the foregoing, Defendant's additional motion for summary judgement is herein DENIED.

IT IS SO ORDERED.

/s/ [illegible]
Judge Lee Sinclair

cc: Robert F. Linton, Jr., Esq.
Philip Howes, Esq. /Kimberly Wyss, Esq. (Vogelsang)

APPENDIX E

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Feb 25, 1999]

Case No. 1998 CV 01311

CHRIS A. BONACORSI,

Plaintiff,

VS

WHEELING & LAKE ERIE RAILWAY COMPANY, *et al,*

Defendants.

JUDGMENT ENTRY

Judge Sinclair

This cause came on to be heard on the motion for partial summary judgment filed by Defendant Wheeling and Lake Erie Railway Company ("W&LE") on the Plaintiff's claim of inadequate signalization. Plaintiff filed a brief in opposition. Construing the pleadings, depositions, affidavits, and briefs of counsel most strongly in favor of the nonmoving party, the court finds that there remain genuine issues of fact and the Defendant is not entitled to summary judgment as a matter of law.

W&LE submits that the duty on which the allegation of wrongdoing is based has been preempted by federal law. In support of its claim that the Federal Railroad Administration ("FRA") and the Federal Highway Administration ("FHWA") in cooperation with ODOT and PUCO, selected and paid for the traffic control devices installed at the crossing, W&LE attached the affidavit of its road master, Bruce E. Brown, and Agreement No. 7294 between ODOT and W&LE.

Before a state law governing warning devices will be deemed preempted, federal funds must actually have been committed and spent, and the warning devices, as defined by applicable federal regulations, must have been installed. *Carpenter v. Consolidated Rail Corporation* (1994), 69 Ohio St.3d 259, citing *CSX Tranportation, Inc. v. Easterwood* (1993), 507 U.S. 658.

W&LE has failed to establish that the crossbuck at the subject railroad crossing were installed pursuant to a federally funded plan. Brown's affdavit states that said crossbucks were installed on October 12, 1995. Section IV of the Agreement states:

> "The PROJECT work specified herein shall be completed by December 31, 1993, unless completion of such PROJECT work is prevented by a force majeure occurrence."

Further, the crossbuck could have been paid by funds other than Federal Aid Highway Safety funds as evidenced by Section VII of the Agreement which provides, in pertinent part:

> ". . . STATE will obtain the monies for such installation from Surface Transportation Program (STP) and/or Federal Aid Highway Safety funds, as provided by the Federal Aid Highway Safety Act of 1973 and the Intermodal Surface Transportation Efficiency Act of 1991."

W&LE has also failed to establish the program had the approval of the FHWA as a Federal Aid Project. *Gollihue, et al v. Consolidated Rail Corporation* (1997), 120 Ohio App.3d 378.

Under Ohio common law, railroads have a duty to use ordinary care to protect motorists from and warn them of trains occupying or approaching a highway crossing.

Matkovich v. Penn Cent. Transp. Co. (1982), 69 Ohio St.2d 210. The measures a railroad must take to meet the duty is a question of fact, and they may include extra-statutory forms of warning. *Id.*

In light of the foregoing, Defendant Wheeling and Lake Erie Railway Company's motion for partial summary judgment on the claim of inadequate signalization is hereby OVERRULED.

IT IS SO ORDERED.

/s/ [illegible]
Judge Lee Sinclair

cc: Robert F. Linton, Jr. Esq.
Philip Howes, Esq. /Kimberly Wyss, Esq. (Vogelsang)

APPENDIX F

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

[Filed Aug 05, 2002]

Case No. 1998-CV-01311

CRIS A. BONACORSI,
Plaintiff(s),

-VS-

WHEELING & LAKE ERIE RR,
Defendant(s).

JUDGMENT ENTRY GRANTING STAY OF EXECUTION AND RESTRAINING ORDER

Judge Lee Sinclair

Defendant, Wheeling & Lake Erie Railway Co., having moved this Court for a stay of execution of the judgment of the trial court, and the Court finding the motion to be well taken, it is hereby

ORDERED that the enforcement or execution of the judgment of the trial court in this matter be and hereby is stayed pending final determination of the request for a writ of certiorari to the U.S. Supreme Court and any action by the U.S. Supreme Court on that request. The stay of execution shall be effective immediately and shall remain in effect until the termination of proceedings in the U.S. Supreme Court. Security for this stay, unless further ordered, shall be in the form of a deposit of $1,470,000.00 by the defendant into a

security account with KeyBank bearing account number 354261006343. The security shall be held in that account until released by order of this Court.

It is further ORDERED that the parties, their counsel, representatives, employees, all those acting in concert with them, and all other persons or entities to whom actual notice of this order is given are restrained from withdrawing, depleting, releasing, paying or otherwise converting the security deposited in the above account unless and until further order of this Court.

It is further ORDERED that the restraining order of this Court, signed by this Court on July 22, 2002, is hereby dissolved.

/s/ [Illegible]
JUDGE LEE SINCLAIR

COPY TO: ROBERT LINTON, JR., ESQ.
STEVEN PAULSON, ESQ.
PHILIP HOWES, ESQ. (HOWES, GODSHALL)

NOTICE

TO THE CLERK OF COURTS:

Please see that a copy of the within entry is served on KeyBank at 126 Central Plaza, North, Canton, OH 44702, by personal service, by Order of the Court.

/s/ [Illegible]
JUDGE LEE SINCLAIR

THE COURT OF COMMON PLEAS
OF STARK COUNTY

[Filed Aug. 05, 2002]

JUDGE
LEE SINCLAIR

115 CENTRAL PLAZA NORTH
CANTON, OHIO 44702
(330) 451-7789
FAX (330) 451-7740
Email: Judge1@co.stark.oh.us

August 1, 2002

Philip Howes, Esq.
Howes, Godshall
400 Tusc. St., W., Ste. 200
Canton, OH 44701

And

Robert Linton, Esq.
1500 One Cascade Plaza
Akron, OH 44308

Re: Bonacorsi vs Wheeling & Lake Erie Railway Company
1998-CV-01311

Gentlemen:

Please find enclosed the Court's judgment entry in the above-captioned matter. The Court has revised the entry to provide the essence of what was requested by both sides. Please see that a copy of this order is served on the financial institution. Please note that the Court has also requested that the entry be served on the financial institution.

Sincerely,

/s/ [Illegible]
JUDGE LEE SINCLAIR

VS/pjm

Enclosure

Cc: Steven Paulson, Esq.

THE COURT OF COMMON PLEAS
OF STARK COUNTY

JUDGE
LEE SINCLAIR

115 CENTRAL PLAZA NORTH
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(330) 451-7789
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August 5, 2002

Philip Howes, Esq.
Howes, Godshall, Daane
400 Tusc. St., West, Ste. 200
Canton, OH 44702

And

Robert Linton, Jr., Esq.
Steven Paulson, Esq.
1500 One Cascade Plaza
Akron, OH 44308

Re: Bonacorsi v. Wheeling & Lake Erie
Case No. 1998-CV-01311

Gentlemen:

Please be advised that the Court has now issued the stay order forwarded to your offices last week. It would be my suggestion that, upon the conclusion of this matter in the United States Supreme Court, the parties immediately notify this Court. Upon notification, we will set the matter immediately before Judge Lile for a final determination as to any amount due including any issue of prejudgment and/or post judgment interest that may exist.

Sincerely,

Judge Lee Sinclair

VS/pjm

Cc: Judge Lile

APPENDIX G

THE SUPREME COURT OF OHIO

[Filed July 3, 2002]

Case No. 00-2278

CRIS A. BONACORSI,

Appellant,

v.

WHEELING AND LAKE ERIE RAILWAY CO.,

Appellee.

RECONSIDERATION ENTRY
(Stark County)

This cause came on for further consideration upon appellee's motion for reconsideration, and in the alternative, for remand and to stay the mandate; and appellant's motion to strike exhibits A, B and C attached to the motion for reconsideration. Upon consideration thereof,

IT IS ORDERED by the Court that the motions be, and hereby are, denied.

(Court of Appeals No. 1999CA000407)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX H

STATUTES

23 U.S.C. § 109. Standards

* * * *

(e) No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2 of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing or drawbridge on that portion of the highway with respect to which such expenditures are to be made.

* * * *

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 894; Pub.L. 88-157, § 4, Oct. 24, 1963, 77 Stat. 277; Pub.L. 89-574, §§ 5(a), 14, Sept. 13, 1966, 80 Stat. 767, 771; Pub.L. 91-605, Title I, § 136(a), (b), Dec. 31, 1970, 84 Stat. 1734; Pub.L. 93-87, Title I, §§ 114, 152(2), 156, Aug. 13, 1973, 87 Stat. 257, 276, 277; Pub.L. 95-599, Title I, §§ 113, 116(d), 141(f), (g), Nov. 6, 1978, 92 Stat. 2696, 2699, 2711; Pub.L. 96-106, § 3, Nov. 9, 1979, 93 Stat. 797; Pub.L. 97-424, Title I, § 110(a), Jan. 6, 1983, 96 Stat. 2105; Pub.L. 102-240, Title I, § 1016(c) to (f)(1), Dec. 18, 1991, 105 Stat. 1946; Pub.L. 104-59, Title III, §§ 304, 305(a), Nov. 28, 1995, 109 Stat. 579, 580; Pub.L. 105-178, Title I, §§ 1202(c), 1212(a)(2)(A), 1306, June 9, 1998, 112 Stat. 170, 193, 229.)

23 U.S.C. § 130. Railway-highway crossings

(a) Subject to section 120 and subsection (b) of this section, the entire cost of construction of projects for the elimination of hazards of railway-highway crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings,

may be paid from sums apportioned in accordance with section 104 of this title. In any case when the elimination of the hazards of a railway-highway crossing can be effected by the relocation of a portion of a railway at a cost estimated by the Secretary to be less than the cost of such elimination by one of the methods mentioned in the first sentence of this section, then the entire cost of such relocation project, subject to section 120 and subsection (b) of this section, may be paid from sums apportioned in accordance with section 104 of this title.

(b) The Secretary may classify the various types of projects involved in the elimination of hazards of railway-highway crossings, and may set for each such classification a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction. The percentage so determined shall in no case exceed 10 per centum. The Secretary shall determine the appropriate classification of each project.

(c) Any railroad involved in a project for the elimination of hazards of railway-highway crossings paid for in whole or in part from sums made available for expenditure under this title, or prior Acts, shall be liable to the United States for the net benefit to the railroad determined under the classification of such project made pursuant to subsection (b) of this section. Such liability to the United States may be discharged by direct payment to the State transportation department of the State in which the project is located, in which case such payment shall be credited to the cost of the project. Such payment may consist in whole or in part of materials and labor furnished by the railroad in connection with the construction of such project. If any such railroad fails to discharge such liability within a six-month period after completion of the project, it shall be liable to the United States for its share of the cost, and the Secretary shall request

the Attorney General to institute proceedings against such railroad for the recovery of the amount for which it is liable under this subsection. The Attorney General is authorized to bring such proceedings on behalf of the United States, in the appropriate district court of the United States, and the United States shall be entitled in such proceedings to recover such sums as it is considered and adjudged by the court that such railroad is liable for in the premises. Any amounts recovered by the United States under this subsection shall be credited to miscellaneous receipts.

(d) Survey and schedule of projects.—Each State shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. At a minimum, such a schedule shall provide signs for all railway-highway crossings.

(e) Funds for protective devices.—At least 1/2 of the funds authorized for and expended under this section shall be available for the installation of protective devices at railway-highway crossings. Sums authorized to be appropriated to carry out this section shall be available for obligation in the same manner as funds apportioned under section 104(b)(1) of this title.

(f) Apportionment.—Twenty-five percent of the funds authorized to be appropriated to carry out this section shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(2) of this title, 25 percent of such funds shall be apportioned to the States in the same manner as sums are apportioned under section 104(b)(6) of this title, and 50 percent of such funds shall be apportioned to the States in the ratio that total railway-highway crossings in each State bears to the total of such crossings in all States. The Federal share payable on account of any project financed

with funds authorized to be appropriated to carry out this section shall be 90 percent of the cost thereof.

(g) Annual report.—Each State shall report to the Secretary not later than December 30 of each year on the progress being made to implement the railway-highway crossings program authorized by this section and the effectiveness of such improvements. Each State report shall contain an assessment of the costs of the various treatments employed and subsequent accident experience at improved locations. The Secretary shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year, on the progress being made by the State in implementing projects to improve railway-highway crossings. The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, nature of treatment, and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (d) and include recommendations for future implementation of the railroad highway [1] crossings program.

(h) Use of funds for matching.—Funds authorized to be appropriated to carry out this section may be used to provide a local government with funds to be used on a matching basis when State funds are available which may only be spent when the local government produces matching funds for the improvement of railway-highway crossings.

(i) Incentive payments for at-grade crossing closures.—

(1) In general.—Notwithstanding any other provision of this section and subject to paragraphs (2) and (3), a

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[1] So in original. Probably should be "railroad-highway".

State may, from sums available to the State under this section, make incentive payments to local governments in the State upon the permanent closure by such governments of public at-grade railway-highway crossings under the jurisdiction of such governments.

(2) Incentive payments by railroads.—A State may not make an incentive payment under paragraph (1) to a local government with respect to the closure of a crossing unless the railroad owning the tracks on which the crossing is located makes an incentive payment to the government with respect to the closure.

(3) Amount of State payment.—The amount of the incentive payment payable to a local government by a State under paragraph (1) with respect to a crossing may not exceed the lesser of—

(A) the amount of the incentive payment paid to the government with respect to the crossing by the railroad concerned under paragraph (2); or

(B) $7,500.

(4) Use of State payments.—A local government receiving an incentive payment from a State under paragraph (1) shall use the amount of the incentive payment for transportation safety improvements.

(j) Bicycle safety.—In carrying out projects under this section, a State shall take into account bicycle safety.

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 903; Pub.L. 100-17, Title I, § 121(a), Apr. 2, 1987, 101 Stat. 159; Pub.L. 104-59, Title III, § 325(a), Nov. 28, 1995, 109 Stat. 591; Pub.L. 104-205, Title III, § 353(b), Sept. 30, 1996, 110 Stat. 2980; Pub.L. 105-178, Title I, §§ 1111(d), 1202(d), 1212(a)(2)(A)(i), June 9, 1998, 112 Stat. 146, 170, 193.)

49 U.S.C. § 20106. National uniformity of regulation

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

(July 5, 1994, Pub.L. 103-272, § 1(e), 108 Stat. 866.)

APPENDIX I

REGULATIONS

23 C.F.R. § 646.214 Design.

(a) *General.* (1) Facilities that are the responsibility of the railroad for maintenance and operation shall conform to the specifications and design standards used by the railroad in its normal practice, subject to approval by the State highway agency and FHWA.

(2) Facilities that are the responsibility of the highway agency for maintenance and operation shall conform to the specifications and design standards and guides used by the highway agency in its normal practice for Federal-aid projects.

(b) *Grade crossing improvements.* (1) All traffic control devices proposed shall comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) *Adequate warning devices,* under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

(c) *Grade crossing elimination.* All crossings of railroads and highways at grade shall be eliminated where there is full control of access on the highway (a freeway) regardless of the volume of railroad or highway traffic.

[40 FR 16059, April 9, 1975, as amended at 47 FR 33955, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

23 C.F.R. § 646.216 General procedures.

(a) *General.* Unless specifically modified herein, applicable Federal-aid procedures govern projects undertaken pursuant to this subpart.

(b) *Preliminary engineering and engineering services.* (1) As mutually agreed to by the State highway agency and railroad, and subject to the provisions of § 646.216(b)(2), preliminary engineering work on railroad-highway projects may be accomplished by one of the following methods:

(i) The State or railroad's engineering forces;

(ii) An engineering consultant selected by the State after consultation with the railroad, and with the State administering the contract; or

(iii) An engineering consultant selected by the railroad, with the approval of the State and with the railroad administering the contract.

(2) Where a railroad is not adequately staffed, Federal-aid funds may participate in the amounts paid to engineering consultants and others for required services, provided such amounts are not based on a percentage of the cost of construction, either under contracts for individual projects or under existing written continuing contracts where such work is regularly performed for the railroad in its own work under such contracts at reasonable costs.

(c) *Rights-of-way.* (1) Acquisition of right-of-way by a State highway agency on behalf of a railroad or acquisition of nonoperating real property from a railroad shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4601 *et seq.*) and applicable FHWA right-of-way procedures in 23 CFR, Chapter I, Subchapter H. On projects for the elimination of hazards of railroad-highway crossings by the relocation of railroads, acquisition or replacement right-of-way by a railroad shall be in accordance with 42 U.S.C. 4601 *et. seq.*

(2) Where buildings and other depreciable structures of the railroad (such as signal towers, passenger stations, depots, and other buildings, and equipment housings) which are integral to operation of railroad traffic are wholly or partly affected by a highway project, the costs of work necessary to functionally restore such facilities are eligible for participation. However, when replacement of such facilities is necessary, credits shall be made to the cost of the project for:

(i) Accrued depreciation, which is that amount based on the ratio between the period of actual length of service and total life expectancy applied to the original cost.

(ii) Additions or improvements which provide higher quality or increased service capability of the facility and which are provided solely for the benefit of the railroad.

(iii) Actual salvage value of the material recovered from the facility being replaced. Total credits to a project shall not be required in excess of the replacement cost of the facility.

(3) Where Federal funds participate in the cost of replacement right-of-way, there will be no charge to the project for the railroad's existing right-of-way being transferred to the State highway agency except when the value of the right-of-way being taken exceeds the value of the replacement right-of-way.

(d) *State-railroad agreements.* (1) Where construction of a Federal-aid project requires use of railroad properties or adjustments to railroad facilities, there shall be an agreement in writing between the State highway agency and the railroad company.

(2) The written agreement between the State and the railroad shall, as a minimum include the following, where applicable:

(i) The provisions of this subpart and of 23 CFR, Part 140, subpart I, incorporated by reference.

(ii) A detailed statement of the work to be performed by each party.

(iii) Method of payment (either actual cost or lump sum),

(iv) For projects which are not for the elimination of hazards of railroad-highway crossings, the extent to which the railroad is obligated to move or adjust its facilities at its own expense,

(v) The railroad's share of the project cost,

(vi) An itemized estimate of the cost of the work to be performed by the railroad,

(vii) Method to be used for performing the work, either by railroad forces or by contract,

(viii) Maintenance responsibility,

(ix) Form, duration, and amounts of any needed insurance,

(x) Appropriate reference to or identification of plans and specifications,

(xi) Statements defining the conditions under which the railroad will provide or require protective services during performance of the work, the type of protective services and the method of reimbursement to the railroad, and

(xii) Provisions regarding inspection of any recovered materials.

(3) On work to be performed by the railroad with its own forces and where the State highway agency and railroad agree, subject to approval by FHWA, an agreement providing for a lump sum payment in lieu of later determination of actual costs may be used for any of the following:

(i) Installation or improvement of grade crossing warning devices and/or grade crossing surfaces, regardless of cost, or

(ii) Any other eligible work where the estimated cost to the State of the proposed railroad work does not exceed $100,000 or

(iii) Where FHWA finds that the circumstances are such that this method of developing costs would be in the best interest of the public.

(4) Where the lump sum method of payment is used, periodic reviews and analyses of the railroad's methods and cost data used to develop lump sum estimates will be made.

(5) Master agreements between a State and a railroad on an areawide or statewide basis may be used. These agreements would contain the specifications, regulations, and provisions required in conjunction with work performed on all projects. Supporting data for each project or group of projects must, when combined with the master agreement by reference, satisfy the provisions of § 646.216(d)(2).

(6) Official orders issued by regulatory agencies will be accepted in lieu of State-railroad agreements only where, together with supplementary written understandings between the State and the railroad, they include the items required by § 646.216(d)(2).

(7) In extraordinary cases where FHWA finds that the circumstances are such that requiring such agreement or order would not be in the best interest of the public, projects may be approved for construction with the aid of Federal funds, provided satisfactory commitments have been made with respect to construction, maintenance and the railroad share of project costs.

(e) *Authorizations.* (1) The costs of preliminary engineering, right-of-way acquisition, and construction incurred after the date each phase of the work is included in an approved statewide transportation improvement program and authorized by the FHWA are eligible for Federal-aid participation. Preliminary engineering and right-of-way

acquisition costs which are otherwise eligible, but incurred by a railroad prior to authorization by the FHWA, although not reimbursable, may be included as part of the railroad share of project cost where such a share is required.

(2) Prior to issuance of authorization by FHWA either to advertise the physical construction for bids or to proceed with force account construction for railroad work or for other construction affected by railroad work, the following must be accomplished:

(i) The plans, specifications and estimates must be approved by FHWA.

(ii) A proposed agreement between the State and railroad must be found satisfactory by FHWA. Before Federal funds may be used to reimburse the State for railroad costs the executed agreement must be approved by FHWA. However, cost for materials stockpiled at the project site or specifically purchased and delivered to the company for use on the project may be reimbursed on progress billings prior to the approval of the executed State-Railroad Agreement in accordance with 23 CFR 140.922(a) and § 646.218 of this part.

(iii) Adequate provisions must be made for any needed easements, right-of-way, temporary crossings for construction purposes or other property interests.

(iv) The pertinent portions of the State-railroad agreement applicable to any protective services required during performance of the work must be included in the project specifications and special provisions for any construction contract.

(3) In unusual cases, pending compliance with § 646.216(e)(2)(ii), (iii) and (iv), authorization may be given by FHWA to advertise for bids for highway construction under conditions where a railroad grants a right-of-entry to its property as necessary to prosecute the physical construction.

(f) *Construction.* (1) Construction may be accomplished by:

(i) Railroad force account,

(ii) Contracting with the lowest qualified bidder based on appropriate solicitation,

(iii) Existing continuing contracts at reasonable costs, or

(iv) Contract without competitive bidding, for minor work, at reasonable costs.

(2) Reimbursement will not be made for any increased costs due to changes in plans:

(i) For the convenience of the contractor, or

(ii) Not approved by the State and FHWA.

(3) The State and FHWA shall be afforded a reasonable opportunity to inspect materials recovered by the railroad prior to disposal by sale or scrap. This requirement will be satisfied by the railroad giving written notice, or oral notice with prompt written confirmation, to the State of the time and place where the materials will be available for inspection. The giving of notice is the responsibility of the railroad, and it may be held accountable for full value of materials disposed of without notice.

(4) In addition to normal construction costs, the following construction costs are eligible for participation with Federal-aid funds when approved by the State and FHWA:

(i) The cost of maintaining temporary facilities of a railroad company required by and during the highway construction to the extent that such costs exceed the documented normal cost of maintaining the permanent facilities.

(ii) The cost of stage or extended construction involving grade corrections and/or slope stabilization for

permanent tracks of a railroad which are required to be relocated on new grade by the highway construction. Stage or extended construction will be approved by FHWA only when documentation submitted by the State establishes the proposed method of construction to be the only practical method and that the cost of the extended construction within the period specified is estimated to be less than the cost of any practicable alternate procedure.

(iii) The cost of restoring the company's service by adjustments of existing facilities away from the project site, in lieu of and not to exceed the cost of replacing, adjusting or relocating facilities at the project site.

(iv) The cost of an addition or improvement to an existing railroad facility which is required by the highway construction.

[40 FR 16059, April 9, 1975, as amended at 40 FR 29712, July 15, 1975; 47 FR 33956, Aug. 5, 1982; 62 FR 45328, Aug. 27, 1997]

APPENDIX J

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

[Filed: July 12, 2001]

CARL M. FLOOD, et al.,

Plaintiffs,

-V-

CSX TRANSPORTATION, INC., et al.,

Defendants.

Case No. C-2-99-1186
JUDGE SMITH
Magistrate Judge Kemp

OPINION AND ORDER

Plaintiffs assert claims for negligence, punitive damages, and of consortium against defendant CSX Transportation, Inc. ("CSX") out of an accident in which plaintiff was stuck and injured by defendant's train. This matter is before the Court on defendant's motion for partial judgment on the issue of federal preemption of plaintiffs' claim for negligence based upon defendant's alleged negligence in selecting, installing, and maintaining adequate warning devices at the crossing. For the following reasons, the Court grants defendant's motion for partial summary judgment.

I. FACTS

A.

Congress enacted the Federal Railroad Safety Act (FRSA) in 1970 to comprehensively deal with the issue of national

railroad safety. Congress set forth that the FRSA was intended to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents to persons . . . ." 49 U.S.C. § 20201. It contains provisions dealing with, among other things, the marking and visibility of railroad cars, § 20132, licensing of locomotive operators, § 20135, and testing for alcohol and controlled substances, § 20140. To aid in the achievement of these goals, the Act directs the Secretary of Transportation to "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem . . . ." § 20134(a). The FRSA also contains an express pre-emption provision. § 20106. Even after federal standards have been promulgated, the states may adopt more stringent safety requirements when necessary to reduce or eliminate a local safety hazard, as long as those standards are not incompatible with federal law and not unduly burdensome to interstate commerce. *Id.*

In 1973, Congress enacted the Federal Highway Safety Act of 1973 ("FHSA"), which created the Federal Railway-Highway Crossings Program ("the Crossings Program"). 23 U.S.C. § 130. The Crossings Program makes funds available to the states for the "cost of construction of projects for the elimination of hazards of railway-highway crossings." § 130(a). To participate in the Crossings Program, the states must conduct and maintain a survey of all highways that identify railroad crossings that may require "'separation, relocation, or protection devices," and establish and implement a schedule of projects for this purpose. § 130(d). At a minimum, the schedule must provide for signs for all railroad-highway crossings. *Id.*

The Secretary of Transportation, through the Federal Highway Administration ("FHWA"), promulgated regulations implementing the Crossings Program; these regulations include provisions concerning the adequacy of design and use of certain grade crossing equipment and warning devices.

23 C.F.R. § 646.214(b). For all federally funded projects, the States must employ devices that conform to the most recent edition of the "Manual on Uniform Traffic Control Devices for Street and Highways" ("MUTCD"). § 646.214(b)(l). In addition to requiring compliance with MUTCD, §§ 646.214(b)(3) and (4) address the adequacy of warning devices installed under the program. "'Adequate warning devices', under 646.214(b)(2) or on any project where Federal-aid funds 'participate' in the installation of the devices are to include automatic gates with flashing light signals" if any of several special conditions exist. § 646.214(b)(3). Those conditions include: (A) multiple main line railroad tracks; (B) multiple tracks in the vicinity of the crossing such that one train stationary might obscure the movement of another train approaching the crossing; (C) high speed trains at a single or multiple track crossing that has limited sight distance; (D) a combination of either high speeds and moderately high volumes of highway and railroad traffic; (E) either a high volume of vehicular traffic, train movements, substantial numbers of school buses, trucks carrying hazardous materials, unusually restrictive sight distances, or any combination of these; or (F) when a "diagnostic team recommends them." § 646.213(b)(3)(1).

Subsection (b)(4) states that where the requirements of subsection (b)(3) are not applicable, the type of warning device to be installed is subject to FHWA approval, regardless of whether the initial determination is made by a state regulatory agency, state highway agency, and/or the railroad. Therefore, at crossings when any of the conditions contained in (b)(3) exist, adequate warning devices are automatic gates and flashing lights if these are installed using federal funds. Otherwise, where the conditions in (b)(3) are not present, the decision of what devices to install are left to FHWA approval.

Before the States can begin work on any Federal-aid project, a states must submit plans, specifications, and estimates to the FHWA describing the location and design features and constructions requirements. 23 C.F.R. § 630.205. A state's transportation board must obtain authorization to proceed from the FHWA prior to commencement of any Federal-aid highway project. 23 C.F.R. §§ 630.106(a)(1); 630.205(d), (e).

B.

On October 16, 1997, plaintiff Carl Flood drove his dump truck eastbound on Bunty Station Road in rural Delaware County. As plaintiff crossed the railroad tracks intersecting the road, he was struck and injured by a freight train operated by defendant CSX Transportation being driven northbound on a single main line track. At the time of the accident, the Bunty Station Road crossing was equipped with two "improved standard" crossbuck signs.[1] The "improved standard" crossbucks have reflective black-on-white lettering, reflective material on the front and rear of the sign posts, and reflective material on the front and rear of the crossblade posts.[2]

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[1] Crossbucks are the familiar black-and white, X-shaped signs that read "RAILROAD CROSSING."

[2] Other signs installed at other crossings were the experimental "Buckeye" Crossbucks. These signs appeared the same as the "improved standard" crossbucks, but also had red-on-white reflective lettering, and a new sign mounted on the crossbucks post at mototists' eye level 38" high that had the word "YIELD" on it in large red, reflective lettering. This additional sign is designed to increase motorist recognition of the rail-highway crossing, and angled to reflect the oncoming train headlight in the direction of the motorist, thereby warning of approaching trains. All four sides of the "Buckeye" crossbucks contain reflectors as well. While the added features of the experimental system are most effective at night, the red on white color scheme and supplemental three-paneled shield adds value for increased daytime recognition.

On April 22, 1994, the FHWA issued the Ohio Department of Transportation ("ODOT") a letter of approval and authorization allowing Ohio to proceed with statewide installation of the Buckeye Crossbuck signs under the Buckeye Crossbuck Program at CSX rail lines statewide (Doc. 31, Exh. C). The plan called for replacement of existing crossbucks at passive crossings[3] with experimental Buckeye Crossbucks at crossings identified by ODOT's inventory identification as even-numbered crossings, and "improved standard" reflectorized crossbucks at ODOT-recognized odd-numbered crossings. On December 7, 1995, two "improved standard" crossbucks were installed at the Bunty Station Road crossing as this crossing was identified by ODOT as an odd-numbered crossing.

II. SUMMARY JUDGMENT STANDARD

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(e), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *See Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate,

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[3] Passive crossings are defined as those that necessitate only the standard crossbucks, as opposed to active crossings, which are defined as those necessitation crossbucks, flashing lights, and preventative gates.

however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* have effected "a decided change in summary judgment practice," ushering in a "new era" of summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479. In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "show that there is some metaphysical doubt as to the material facts." *Id.* (quoting *Matsushita* 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* Rather, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III. DISCUSSION

"When a state statute conflicts with, or frustrates, federal law, the former must give way." U.S. Const., Art. VI, cl. 2; *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658, 663 (1993). Plaintiffs argue that defendant CSX had a state law duty to select, install, and maintain active warning devices at the Bunty Station Road crossing. The Supreme Court held in *Easterwood* that the language of the FSRA's pre-emptive provision will only lie if federal regulations substantially subsume, or cover, the subject matter of the relevant state law. *See id.* at 664. The Court therefore concluded that §§ 646.214(b)(3) and (4) were pre-emptive because they displaced state and private decision-making authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained. *See id.* at 670. Accordingly, the federal regulations cover the same subject matter of warning device selection, and, when applicable, preempt state tort law. *See id.* at 670

Sections 646.214(b)(3) and (4) are "applicable" when three requirements are met: (1) the FHWA approves a crossing improvement project; (2) the improvements are "actually installed and operating"; and, (3) federal funds participate in the crossing improvement project. *See Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 354 (2000). Defendants submit the uncontroverted affidavit of Susan J. Kirkland, Manager of the Rail-Highway Safety Section of the Ohio Rail Development Commission, which oversees the Buckeye Crossbuck Program. Ms. Kirkland avers that the warnings at the Bunty Station Road crossing were installed on December 7, 1995 pursuant to approval granted by the FHWA and paid for entirely with federal funds. Exhibits containing documents of the Ohio Rail Development Commission accompany and support her affidavit (See Kirkland Aff., Exhs A-E). As a result, Ohio tort law that

purports to place an independent duty upon defendant to select, install, and maintain active warning devices is preempted.

Nevertheless, plaintiffs advance arguments that preemption is inapplicable in this case. Plaintiff's contend that §§ 646.214(b)(3) and (4) do not apply to the Bunty Station Road crossbucks because their installation was authorized pursuant to 23 U.S.C. § 403 and funded pursuant to the Intermodal Surface Transportation Efficiency Act of 1991 ("ISTEA"), Pub.L. 102-240, at 105 Stat. 1914-2207, which provides authorization and funding for highway safety and demonstration projects. ISTEA is extensive legislation affecting railroad and highway safety. However, the mere fact that the Buckeye Crossbucks Program may have been funded in part from funds appropriated by ISTEA does not affect preemption. The plain language of the regulations belie this interpretation. Section 626.200(b) states:

> [t]his subpart, and all references hereinafter made to "projects," applies to *Federal-aid projects* involving railroad facilities, including projects for the elimination of hazards of railroad-highway crossings [emphasis added].

This language demonstrates that the term "projects" applies to all railroad projects in which federal-aid is involved. § 644.206 supports this view. It states:

> [p]rojects for the elimination of hazards, to both vehicles and pedestrians, of railroad-highway crossings *may include but are not limited to*:
>
> (1) grade crossing elimination;
>
> (2) reconstruction of existing grade separations; and,
>
> (3) grade crossing improvements.

[emphasis added]. Thus, the definition of those types of projects authorized by subpart B of § 646 appear to not be

subject to any limitation based on the particular federal funding mechanism used. Further, the source of funding for a railroad crossings project appears to be immaterial as well. § 646.208(a) provides that railroad or highway crossing projects "may be funded through the Federal-aid funding source appropriate for the involved project." Section 646.214(b)(3) itself, standing alone, demonstrates that the Secretary of Transportation intended to include all railroad crossing projects within the purview of the regulation. It applies the definition of adequacy of crossing warning devices to "*any* project where Federal-aid funds participate in the installation of the devices . . . [emphasis added].

Shanklin is determinative on the issue of federal preemption based on § 646.214(b)(3) and (4). The Court's sweeping language in *Shanklin* supports the conclusion that the authorizing statute or source of funds is immaterial to a finding of preemption. The Court found the determinative issue to be "whether §§ 646.214(b)(3) and (4) 'are applicable' to *all* warning devices actually installed with federal funds [emphasis added]." *Shanklin* 529 U.S. at 353. Later, the Court concluded that § 646.214(b)(3) applies to "*any* project where Federal-aid funds participate in the installation of the devices," and § 646.214(b)(4) applies to "all federally funded crossings that do not meet the criteria specified in (b)(3)." *Id.* at 356.

Plaintiffs' first argument is also futile in light of their second argument, both widely-held and incorrect, that preemption should not apply where no independent adequacy determination has occurred under the regulations, or the incorrect type of warning was installed. *Shanklin* is clear that evidence of an individualized crossing determination is not a necessary predicate to a finding of preemption. The Court held:

> Nor does their [the regulations'] applicability depend on any individualized determination of adequacy by a

> diagnostic team or an FHWA official. Rather, as the FHWA itself explained in its *Easterwood* brief, §§ 646.214(b)(3) and (4) have a "comprehensive scope."

The Court also specifically rejected the "minimum protection" versus "priority" or "hazard" program, noting that it contradicted the plain text of the regulation. *See id.* at 355-356. The type of crossing installed has no bearing on the issue of preemption. In the same way, the source of authorization or funding for a particular crossing has no bearing on the issue of preemption. As a result, plaintiffs' arguments are without merit.

IV. CONCLUSION

Based on the foregoing, defendant's partial motion for summary judgment motion is GRANTED as to the issue of pre-emption on plaintiffs' claim of negligent design, installation, and maintenance of the warnings at Bunty Station Road.

The Clerk shall remove document 31 from the Court's pending motions list.

IT IS SO ORDERED

/s/ GEORGE C. SMITH
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT